

access
to justice

rule
of law

innovation

ambition

public
interest

Fit for the Future

Report of the Independent
Review of Legal Services
Regulation in Scotland

Esther A Robertson

consumer
focus

Contents

Author’s Preface	2
Chapter 1 Executive summary and recommendations	3
Chapter 2 Introduction and approach to the review	10
Chapter 3 Landscape of the regulation of legal services in Scotland	12
Chapter 4 Is there a case for strategic change?	19
Chapter 5 Vision for the future of regulation of Scottish legal services	30
Chapter 6 New regulatory model / the proposed regulator	32
Chapter 7 Entry, standards, monitoring, complaints and redress for individuals and entities	36
Chapter 8 Implications for the organisations in the existing regulatory framework	45
Chapter 9 Cost of new regulatory arrangements	46
Chapter 10 Economic contribution of legal services	48
Chapter 11 Overview of recommendations	50
Annex 1 Panel members	53
Annex 2 Engagement during the review	55
Bibliography	56

Author's Preface



In April 2017 I was invited by Annabelle Ewing MSP, the then Scottish Government Minister for Community Safety and Legal Affairs, to conduct an independent Review of the regulation of legal services in Scotland. This was a result of a commitment by the Scottish Government in response to a case for change made by the Law Society of Scotland and others.

The stated purpose of the Review was to make recommendations to reform and modernise the existing framework to ensure a proportionate approach which would support growth and competitive provision in the legal services sector whilst placing consumer interests firmly at its heart. I was required to consider:

- the public and consumer interest
- the interests of the professions and providers
- the interests of the Scottish economy

I had the privilege of working with an advisory panel of distinguished individuals who brought a range of knowledge and expertise and I am hugely grateful for their contribution. They provided both support and significant challenge in an atmosphere of mutual respect and good humour.

I was also ably supported by a Review secretariat made up of some of the most committed and enthusiastic people I have had the pleasure to work with, namely Hazel Dalgård, Susan Bulloch, Jamie Wilhelm and colleagues. My thanks to them for their patience and tolerance.

Over the course of eighteen months I found that there was significant consensus around the key concerns but perhaps unsurprisingly, less consensus on the potential solutions. The key issues were around the constraints that the current complex model of regulation imposes on the potential for growth in the sector and the unanimous view that the system for handling complaints is not fit for purpose.

The recommendations contained in the report are mine and I accept full responsibility for them. All of the panel members agree with some of them but, as might be expected, some do not agree with all of them. In fact, a minority of members expressed significant disagreement with the primary recommendation and I wholly respect that view.

I am ambitious for and optimistic about the future of the legal services sector in Scotland. I believe that better regulation that focuses on outcomes for both the consumer and the sector can be a powerful enabler. It can help the sector build a successful future and to flourish, supported by a fair and proportionate regulatory model in which everyone can have confidence and which meets the needs of the people of Scotland in the twenty-first century.

I would like to thank the Minister for giving me the opportunity to undertake what has been the most intellectually stimulating and challenging task of my career to date. I urge the Scottish Government to give my proposals careful consideration and to grasp the very timely opportunity I believe they present.



Esther A Robertson

October 2018

Chapter 1

EXECUTIVE SUMMARY AND RECOMMENDATIONS

Background

In April 2017 I was invited by Annabelle Ewing MSP, the then Scottish Government Minister for Community Safety and Legal Affairs to lead an independent and wide-ranging review of the regulation of legal services in Scotland. Concerned that the current regime was dated and no longer fit for purpose, the stated purpose of the 18 month Review was to propose to Government independent recommendations to reform and modernise the framework for the regulation of legal services and complaints handling.

The Minister asked that in any new system of regulation recommended, including the competitive provision of legal services, two key interests be placed firmly at its heart:

- the public and consumer interest; and
- the promotion of a flourishing legal sector in Scotland.

The Review looked carefully at the existing regulatory framework, the complaints and redress processes for providers of legal services including solicitors and advocates and on-going market issues such as the benefits of regulating firms as well as individual solicitors. Output, in terms of a clear set of recommendations, was expected to inform Ministers' decisions on reform of the regulatory system for legal services which would require legislative change.

In addition to engagement with professional, representative and consumer bodies and regulators of other professions, a two month public consultation, commissioned via a 'Call for Evidence' issued in January 2018, provided input to the evidence gathering stage of the Review. Full details of the remit and approach to the Review and the engagement process are set out in Chapter 2 and Annexes 1 and 2. Responses received on the consultation can be viewed at the Review's website at <https://www.gov.scot/About/Review/Regulation-Legal-Services>.

Existing landscape

The Review looked closely at the existing regulatory landscape of legal services in Scotland, as well as trends and policy developments over the last two decades. By way of comparison the Review also considered reforms in England and Wales since the *Sir David Clementi Review in December 2004* ("Review of the Regulatory Framework for Legal Services in England and Wales"). It also looked at the existing complex complaints framework and at the concerns raised over the multi-faceted, multi-agency process, and the lack of proportionality in terms of time taken and costs. Finally the Review also considered the impact of the existing regulatory framework on the legal services market.

Broader context

The Review took account of recent changes in the Scottish legal sector and had regard to current good practice and international trends and developments in regulation. In the context of the Scottish Government's up-dated 2018 National Performance Framework and 11 National Outcomes, Justice organisations in Scotland collaborated to agree priorities to address the challenges faced in delivering civil, criminal and administrative justice services. Government has set a course on "*modernising civil and criminal law and the justice system to meet the needs of people in Scotland in the twenty-first Century*". The Review presented an opportunity to influence the reform and modernisation of the regulation of legal services and complaints handling which will have a bearing on realising that broad shared vision for the future.

Although at the time of writing this report, the UK-EU negotiations are still on-going and the details of the final withdrawal agreement and future relationship unsettled, the Review is again timely and recommendations are made with an eye to the major changes which may come. The details of the transformational approach proposed can be developed in line with the UK's new position.

Conclusions

I concluded that it was possible and timely to establish a new regulatory framework for legal services in Scotland which would enable and support a vibrant, high quality legal services sector for the future. Whilst a modern ground-breaking framework will be challenging to set in place the time is right and the ambition achievable.

There is an opportunity to be grasped by leading the way and building on the professional ethic that Scotland's legal professionals display in their day to day work, creating a system of regulation of which our legal professionals can be truly proud. A regulatory system which will support service improvement, business growth in the legal sector and improve public confidence in legal professionals. This would also further enhance the reputation and brand of the legal profession and help to ensure its future.

There is also an opportunity to place the regulation of legal services in Scotland at the forefront of international regulatory good practice, and improve the way in which consumer interests are visibly as well as practically protected. The new framework that I am recommending to Ministers will: uphold the rule of law; provide access to justice; protect the public and consumers; engender a high degree of public confidence and trust; and maximise the opportunity for the sector to increase its contribution to the Scottish economy.

Recommendations

The Review makes 40 recommendations to Ministers on reform, across 10 themes detailed in Chapter 11. The primary recommendation is set out below:

A new Regulatory Model and Single Independent Regulator

There should be a single regulator for all providers of legal services in Scotland. It should be independent of both government and those it regulates. It should be responsible for the whole system of regulation including entry, standards and monitoring, complaints and redress. Regulation should cover individuals, entities and activities and the single regulator should be a body accountable to the Scottish Parliament and subject to scrutiny by Audit Scotland.

This recommendation, which forms the foundation on which all other recommendations are built, is framed by the fundamental consumer principle that a good regulatory system should be independent of those being regulated.

I concluded that those who use legal services, and those that deliver these services, will be best served in the future by independent regulation that meets internationally recognised regulation principles and standards, putting the legal services sector in Scotland at the forefront of reform and innovation. I recommend that:

The proposed new regulatory model – should be principles based and embed the Better Regulation Principles set out in the *Regulatory Reform (Scotland) Act 2014* and deliver a risk-based regulatory regime. It needs to deliver independent regulation within a context of clear accountability for the delivery of the key principle of public interest, whilst also having a degree of accountability to the professions it serves. The primary legislation required to introduce the new single regulator model should focus on high level principles and take an enabling approach. It also require the new regulator to develop a complaints handling process based on best practice, which is less legalistic and provides faster resolution for all parties. It should also specify the structure, functions, governance and appointments process for the single independent regulator.

An **overview chart** showing the new landscape model and how a single independent regulator would fit into it is set out on page 7 of the report.

The proposed new Single Independent Regulator- should deliver the following key outcomes for those served by the new regulatory model:

- enable access to justice including choice and diversity
- uphold the rule of law and the proper administration of justice
- offer accountability in protecting the public and consumer interest
- secure the confidence and trust of the public
- enable future growth of the legal profession

The new single body should regulate individuals including solicitors, solicitor advocates, advocates and commercial attorneys, have the powers to regulate entities and should be empowered to seek approval as a regulator in other jurisdictions. It should be responsible for the three stages of regulation: setting and seeking to improve standards; setting

out the code of conduct and ethical framework for practitioners and monitoring performance against those; and complaints and redress.

In delivering its key functions the independent regulator should be required to work in collaboration with membership organisations, consumer bodies and other organisations.

Operation of the new regulatory model – entry standards and monitoring

The single independent regulator should be responsible for entry, standards, monitoring, complaints and redress as well as the wider roles around quality assurance, prevention and continuous improvement. This would not be a one size fits all model, as clearly the arrangements for each of the professional areas should be appropriate and proportionate to the business carried out by those professional groups. It should also have an approval function on education, which should be developed collaboratively with the professional bodies, who will also have a key role in developing and delivering continuous professional development of their members.

The proposed system would streamline the current landscape by:

- providing the independent regulator with responsibility for oversight of education, standards and continuing professional development across all legal professional groups
- streamlining individual professional regulation i.e. all of those who provide legal services must be registered with the independent regulator
- introducing entity regulation to support more innovative business models and delivery methods and to assist with regulating presently unregulated individuals within unregulated entities
- providing a much clearer line of sight from failure to meet standards to redress procedures for individuals and entities where standards and redress mechanisms are more transparent

It will require the new independent regulator to put in place a system of licensing of all legal professionals who practice whether or not they provide services directly to the public and hold a register for those legal professionals.

The independent regulator should also have responsibility for setting standards and in doing so should drive a preventative/quality improvement focus,

including simplification and better overall cohesiveness of the rules, making them more consumer friendly, comparable and proportionate. Again the independent regulator should work in partnership with professional bodies to co-produce standards.

Entity regulation

The regulator should introduce a model of entity regulation that is enabling and flexible. The broad description of what comprises an entity should be set out in legislation allowing the regulator to adapt this description over time without the need for further legislation. Entities could involve a combination of legal professionals only (different groups), legal-professionals (from one or more groups) with other regulated professionals e.g. accountants, estate agents, or any of those groups together with unregulated professionals such as will writers or mediators. Legal professionals in an entity with multiple professionals should be regulated by the legal regulator. Other professionals working in the entity would be regulated by their appropriate professional regulator.

Complaints and redress

There was a consistently expressed and strongly held view that the current complaints system was not fit for purpose. I concluded that the new legislation should require the new regulator to take on responsibility for complaints handling. I realise this has significant implications for the Scottish Legal Complaints Commission as the organisation as currently constituted would be wound up and the responsibilities transferred to the new body.

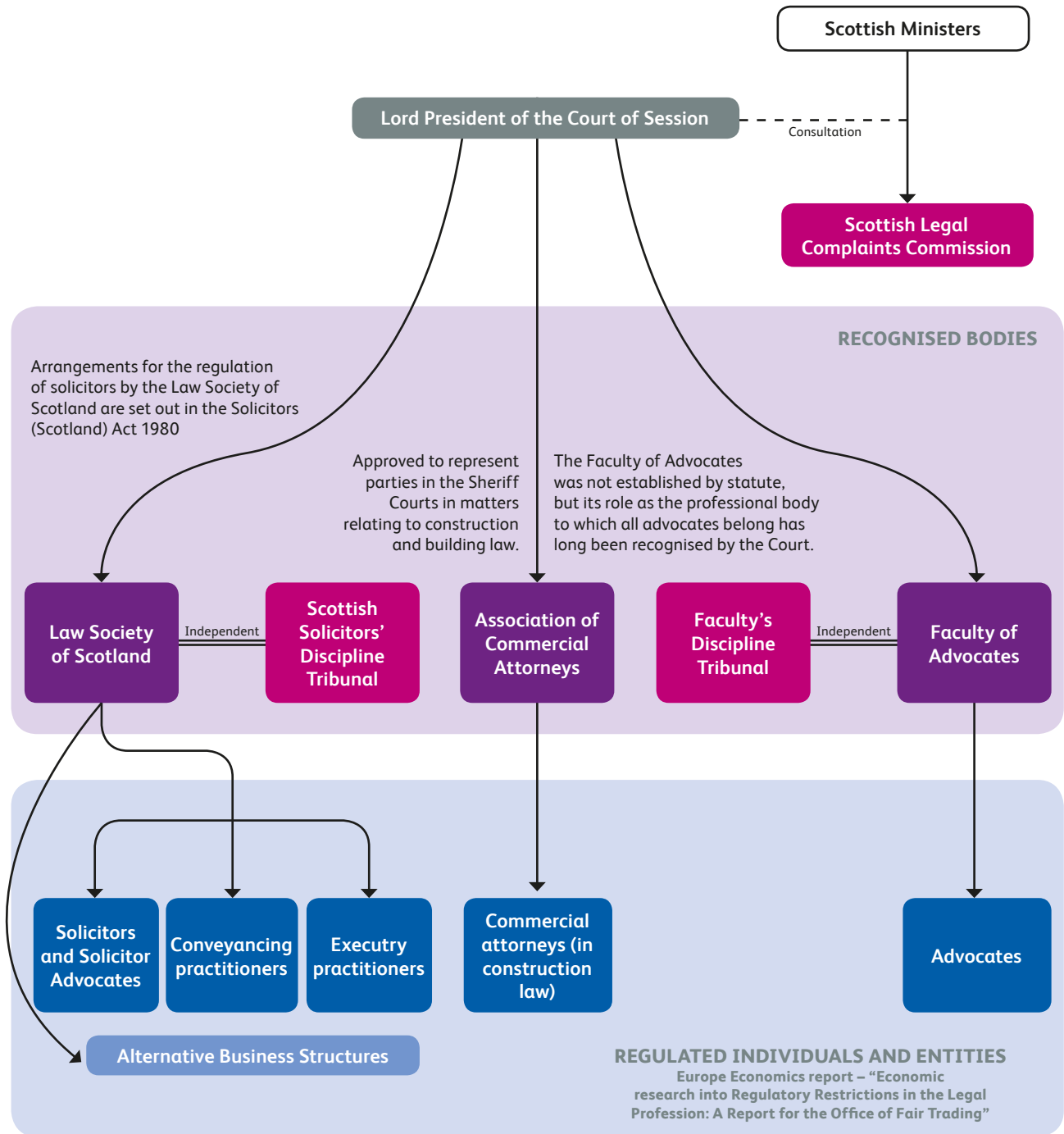
The new legislation should require the regulator to develop a new single gateway complaints handling system for those it regulates driven by consumer principles. For instances of harm, the regulator should also be required to develop appropriate, flexible and fair sanctions, rules for proportionate compensation and a simple process for appeals.

Economic contribution of legal services

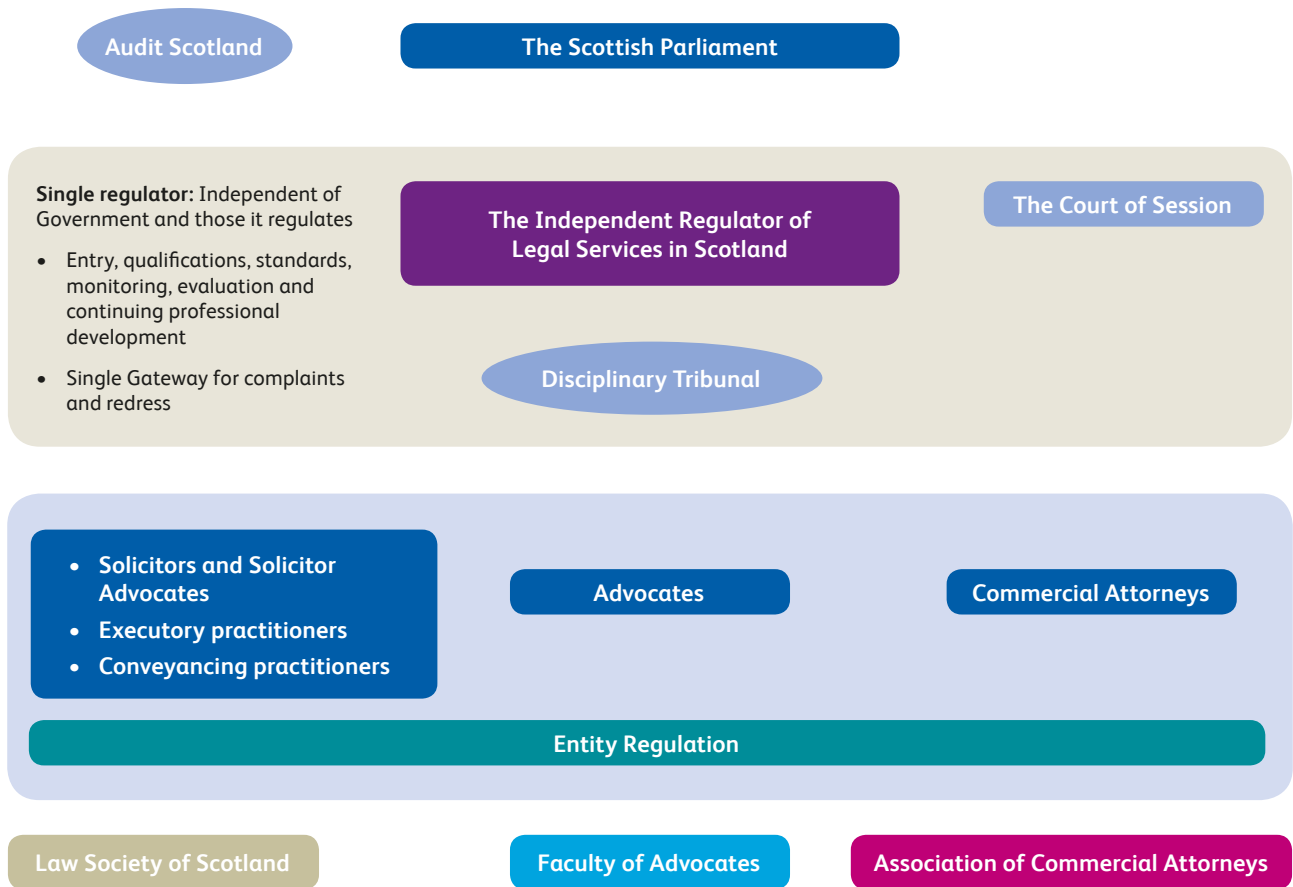
While the Review found little by the way of hard evidence about the contribution the sector makes to the economy it does make recommendations intended to maximise the potential for growth and the contribution the sector could make to Scotland's economy.

An overview of all 40 recommendations is set out at Chapter 11 of the report and further detail on each contained in Chapters 6 to 10.

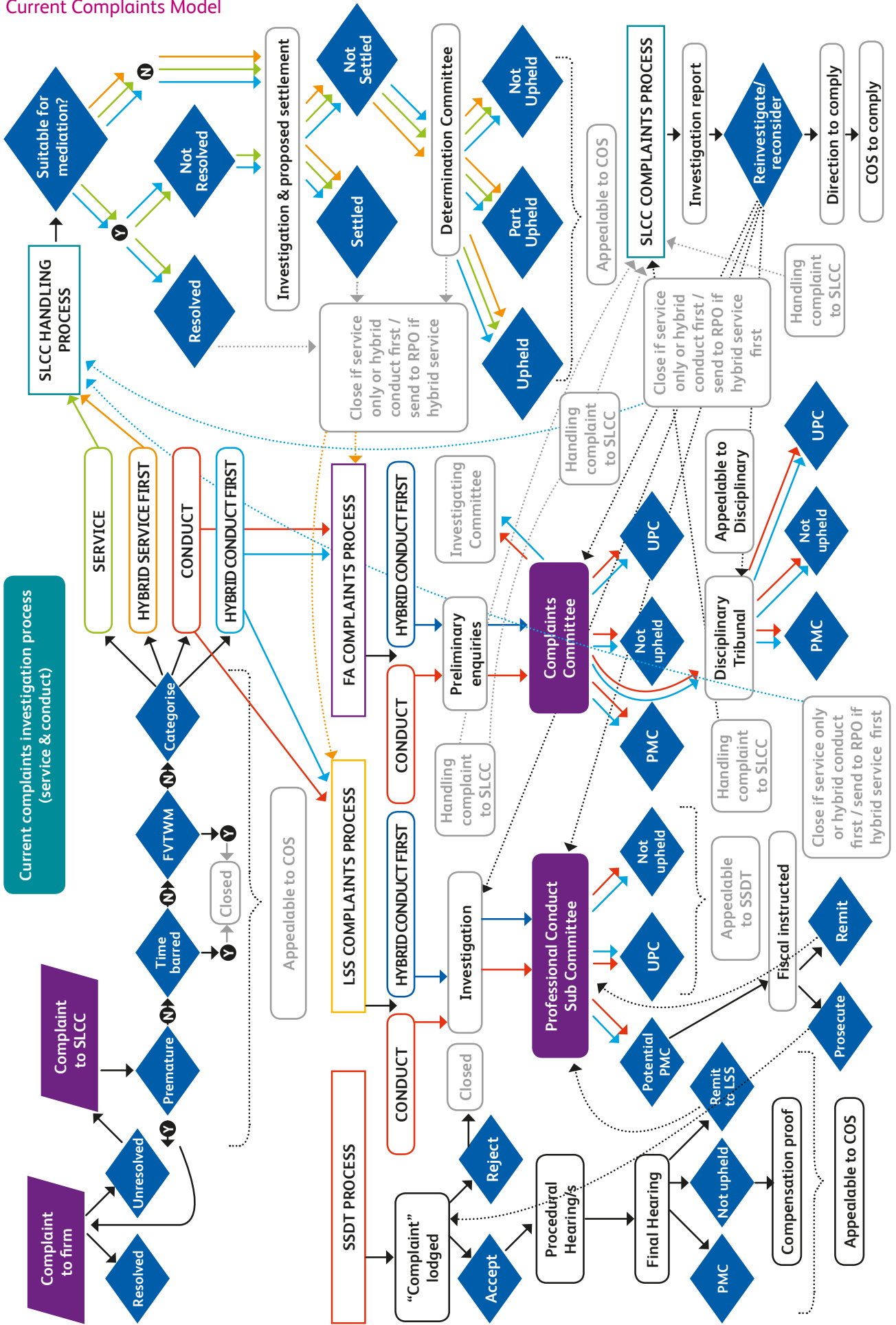
Current Landscape Model



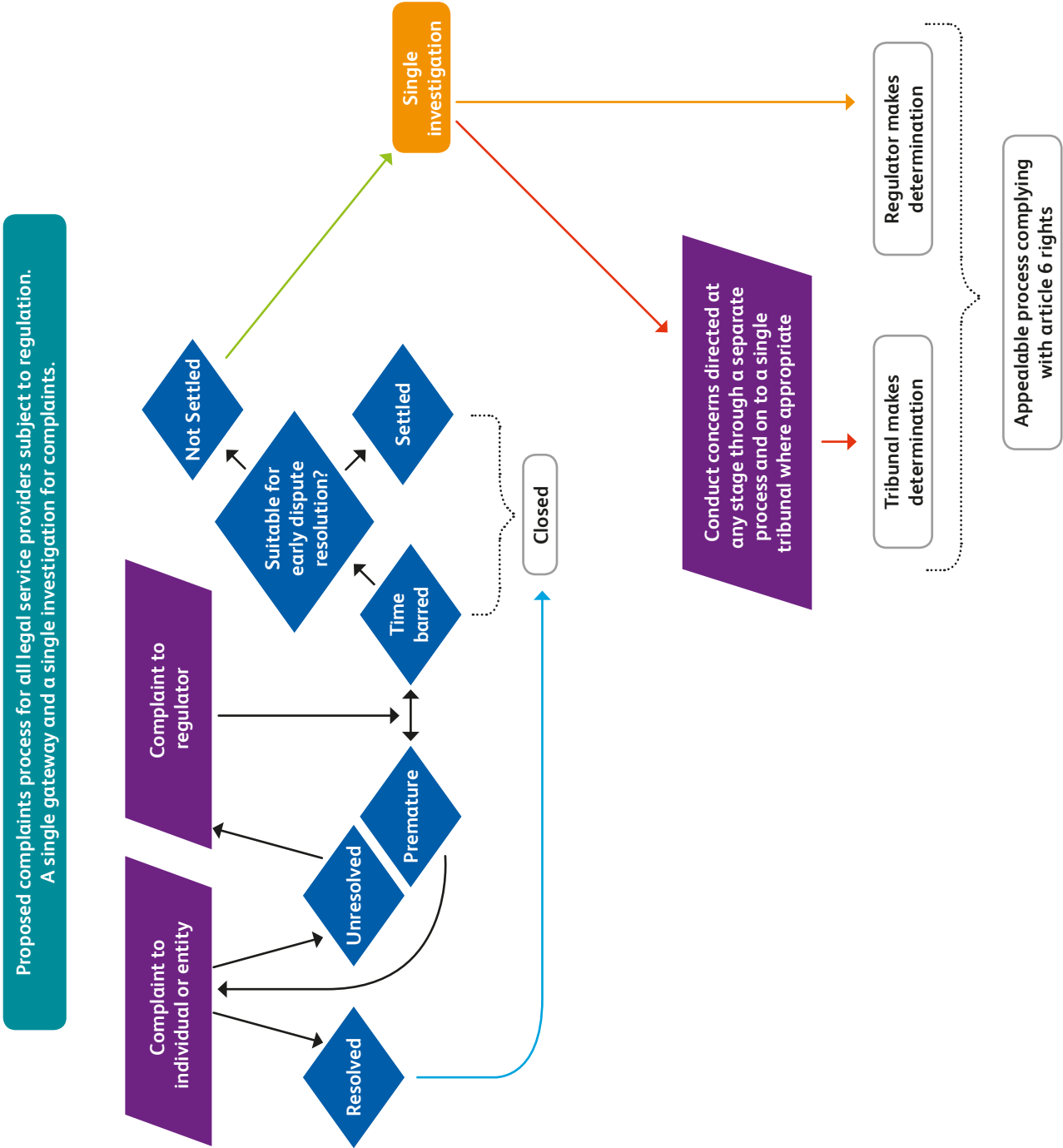
Proposed Landscape Model



Current Complaints Model



Proposed Complaints Model



Chapter 2

INTRODUCTION AND APPROACH TO THE REVIEW

Remit and Strategic Context

The Independent Review of the Regulation of Legal Services was launched by the Scottish Government on 25 April 2017, against the backdrop of stakeholders believing there was an urgent need to make changes to the complaints and redress system. The Law Society of Scotland argued for a new legislative framework for the regulation of legal services in Scotland, including the complaints system which would effectively sweep away the patchwork of existing and consolidated legislation and provide a new framework for many elements of the regulation of legal services which would be more modern and responsive for the twenty-first century. As well as a complaints system that was not fit for purpose for either consumers or legal professionals, they cited increasing internationalisation and globalisation trends including pressures on Scottish legal firms, large and small.

The Minister's announcement in April 2017 stated that:

“Scottish Ministers propose to establish an Independent Review of the Regulation of Legal Services. The purpose of the Review will be to make independent recommendations to reform and modernise the statutory framework for the regulation of legal services and complaints handling. The Review is intended to ensure a proportionate approach to regulation that supports growth in the legal services sector. It should also place consumer interests firmly at the heart of any system of regulation, including the competitive provision of legal services. The Review will focus on the current regulatory framework, the complaints and redress process for providers of legal services, including solicitors and advocates, and ongoing market issues such as investigating the benefits of regulating firms as well as individual solicitors.”

My remit was to review the regulation of legal services in Scotland and in undertaking this review, to:

- consider what regulatory framework would best promote competition, innovation and the public

and consumer interest in an efficient, effective and independent legal sector

- recommend a framework which will protect the public and consumer interest, promote the principles of accountability, consistency, flexibility, transparency, cost-effectiveness and proportionality
- ensure that the regulatory framework retains the confidence of the profession and the general public
- undertake specific research into the extent of the unregulated legal services market in Scotland and investigate any impacts on consumers, as well as developing a better understanding of the structure of the legal services market

Independent Panel

I was supported by a panel of experts with backgrounds in the regulation of legal services, in the regulation of other sectors and in consumer and academic expertise. Panel members were appointed on an individual, rather than a representative basis. The panel were instrumental in their role in assisting me to understand the complexities of the current landscape and the issues and opportunities at hand. More information on the panel can be found at **Annex 1**.

Approach

The panel met 12 times during the course of the Review. In the early meetings the panel discussed the general approach to the work including:

Maintaining a focus on these important key perspectives:

- the public and consumer interest, the professional and provider interest, and the economy
- individuals, entities and activities to be regulated

The panel had regard to the Better Regulation Principles, introduced in the *Regulatory Reform (Scotland) Act 2014*. The 2014 Act set out Better Regulation Principles to be followed by the Scottish regulators listed in the Act. The Scottish Government considers that the Principles should also be adopted voluntarily by regulators not explicitly listed in the 2014 Act.

The Better Regulation Principles defined by the Act require systems to be:

- proportionate
- consistent
- accountable
- transparent
- targeted only where needed

We adopted a broad framework for regulation as setting the standards, monitoring compliance and providing redress. A broad understanding of the term “legal services” was maintained throughout.

Evidence Base

We considered evidence provided by organisations who produced policy documents setting out their vision for the regulation of legal services. We informally reviewed material in terms of legal services regulation in other jurisdictions around the world as well as considering regulatory models in other sectors in the UK. We also considered a range of documents and publications on consumer issues.

As required by the remit a study of unregulated providers of legal services was commissioned in 2017 through Europe Economics. That study “*The Regulated and Unregulated Legal Services Market in Scotland: A Review of the Evidence – Final Report*” (2018) is published online alongside the findings of this report.

We also quickly established the need for more research in Scotland in the following areas to support the development of the recommendations:

- the structure of the Scottish legal services market
- current consumer experiences of accessing and using legal services

The Europe Economics study was able to deal with the first area on structure as it maps the whole landscape of legal services providers in Scotland including the regulated sector and the smaller unregulated sector.

In terms of the second area of consumer experience, in the absence of a comprehensive baseline survey of consumers of legal services in Scotland, or a market study by the Competition and Markets Authority, as undertaken in England and Wales, we commissioned

the Scottish Government’s User Research Team to undertake a small qualitative *Consumer Study on Scottish Users of Legal Services* (2018). This included clients privately funded or funded by legal aid who visit either private solicitors or seek advice and representation through other routes including non-profit providers. We acknowledge the limitations of the research but consider that it provides interesting illustrative evidence including real life experiences of accessing and using legal services in Scotland today. This research is published on-line alongside the findings of this report.

Stakeholder Engagement

The Minister’s announcement in April 2017 also emphasised that it was essential to undertake comprehensive stakeholder engagement as part of this Review. I engaged in an extensive programme of one to one meetings and wider stakeholder discussion meetings during the lifetime of the Review. I also engaged with a number of representative and regulatory bodies in England and Wales and beyond, as well as regulators of other professions across the UK. A comprehensive list of those engaged is set out at **Annex 2**.

The key stakeholder engagement phase took place during the period October 2017 – June 2018. Throughout the process, I was keen to engage with the full range of providers of legal services and as many consumer voices as possible.

Call for Evidence

A broad and formal gathering of views was initiated through the Call for Evidence launched on 29 January 2018. Responses to the 2 month consultation, were published on 12 June 2018 and are available on the Independent Review’s webpage.

The report that follows draws on that stakeholder engagement and available evidence and sets out my vision and independent recommendations to Ministers on how to reform and modernise the framework for the regulation of the legal services and complaints handling in Scotland.

Chapter 3

LANDSCAPE OF THE REGULATION OF LEGAL SERVICES IN SCOTLAND

The first challenge I faced when commencing the Review was understanding the current complex landscape. **This chapter presents a summary of the regulatory landscape, trends and policy developments in Scotland in the last two decades, as well as a comparison with reforms in England and Wales since the *Sir David Clementi Review in December 2004*.**

History of the legal profession in Scotland

The legal profession in Scotland has a long and distinguished history. The Faculty of Advocates as a body dates back to the foundation of the College of Justice in 1532 with advocates likely working in the courts prior to this. The Faculty remains the regulatory body for advocates.

In terms of a precursor to solicitors, solicitors in Scotland were previously known as writers, writers to the Signet were entitled to supervise use of the King's Signet, the private seal of the early Kings of Scots. They originally had special privileges in relation to the drawing up of documents which required to be signeted. The earliest recorded use of the Signet was in 1369, and Writers to the Signet were included as members of the College of Justice when it was established in 1532. The Royal Faculty of Procurators in Glasgow has existed since the 1600's. The Scottish Law Agents Society was incorporated by Royal Charter in 1884. More recently solicitor advocates came into existence in 1993 as a result of legal reforms permitting solicitors to apply for extended rights of audience in court, i.e. those matching advocates.

Since the establishment of the College of Justice there has been a proliferation of professional associations, including many local bar associations and faculties.

It was the twentieth century which first saw a unified solicitors' profession. "*The Solicitors (Scotland) Act 1933 paved the way towards a more recognisable*

landscape (it was the first time the word "solicitor" was used in statute to encompass all members of that branch of the profession in Scotland) (Thomson Review: Rights of Audience in the Supreme Courts in Scotland, March 2010). The 1933 Act created a General Council of Solicitors in Scotland responsible for regulation, education, training and taking discipline cases to an Independent Discipline Committee established by the same Act.

The Law Society of Scotland and the Solicitors' Discipline Tribunal were established by statute in 1949. The *Solicitors (Scotland) Act 1980* underpins and is central to the regulation of the Solicitors' profession in Scotland. It is a consolidation Act, which brought together a number of pieces of legislation dating back to 1949. The 1980 Act itself has been subject to amendments introduced by various pieces of legislation in 1990, 2003, 2007 and 2010.

The Law Society of Scotland regulates solicitors and solicitor advocates along with conveyancers, who specialise in property law and can carry out the legal side of buying or selling a property, Executor Practitioners appointed to put into effect the terms of a will, and Notaries Public whose area of specialisation is the preparation and certification of documents.

Commercial attorneys are another group of authorised provider, who are regulated by statute by the Association of Commercial Attorneys, established in 2009. Commercial attorneys have a statutory right to represent litigants in courts in relation to construction and building law. Commercial attorneys are not classed as solicitors, lawyers or advocates.

The Scottish Legal Complaints Commission was established under the *Legal Profession and Legal Aid (Scotland) Act 2007* and came into operation on 1 October 2008. The Commission provides a single point of contact for all complaints against legal practitioners operating in Scotland. It investigates and resolves complaints about inadequate professional service; refers conduct complaints to the relevant professional organisation and has oversight of complaint handling across the profession. The Commission is a neutral body and operates independently of the Scottish Government and of

the legal profession. It is funded through a levy on the legal profession.

The Law Society’s initial paper “*The Solicitors (Scotland) Act 1980 – The case for change*” (December 2015) stimulated discussion on the need to review and modernise the way in which legal services were regulated and complaints dealt with. The legal services landscape is much different from that operating when the 1980 Act was passed, and indeed has changed since the more recent legislation of 2007 and 2010.

Legal Services and the Legal Profession in Scotland – current system

Legal services may be defined as legal advice in connection with legal documents such as contract, deed, writ, will or others, as well as legal advice and/or representation for the purpose of applying the law or seeking a legal dispute resolution.

The legal services market is complex and it is difficult to understand who or what is regulated and who or what is not. The 2018 Europe Economics study report provides some helpful ways of thinking about the current regulation of legal professional individuals, entities and activities.

It recognises and describes the complexity as follows:

Reserved services are defined in legislation as a set of legal activities that can only be provided by authorised legal professionals working in an authorised legal firm.

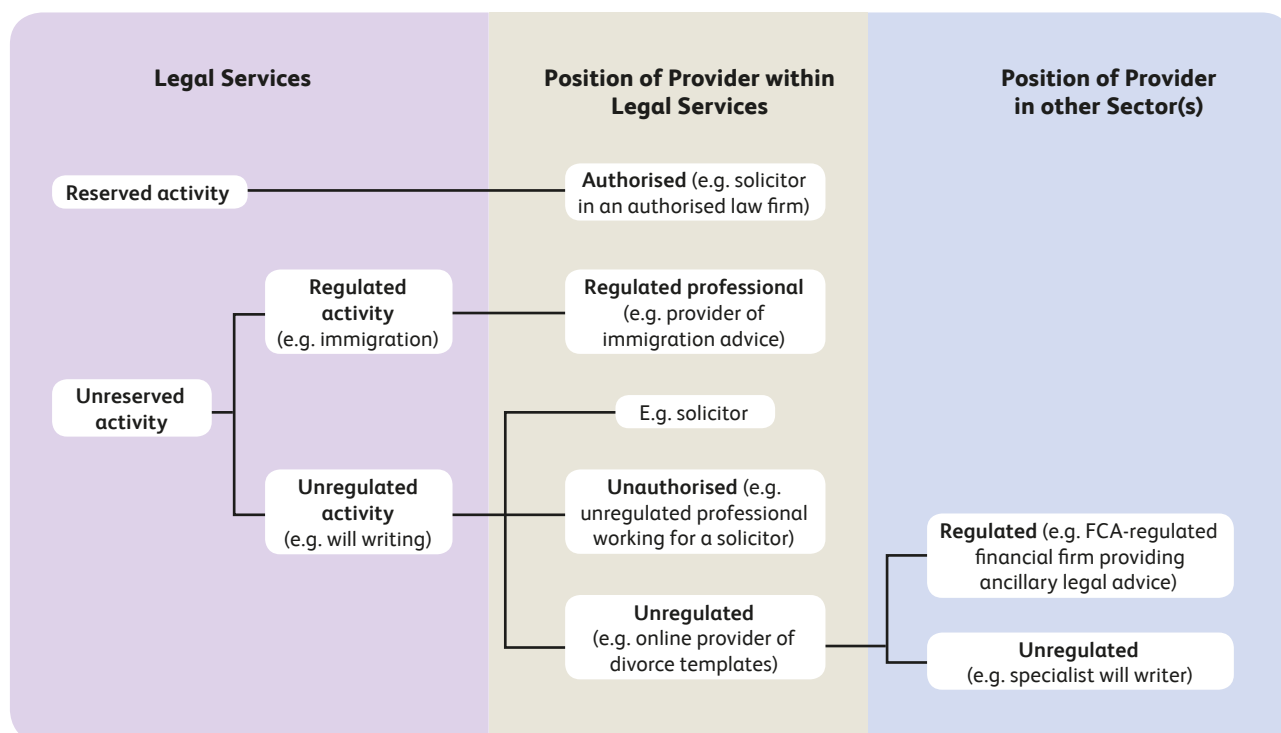
Unreserved services are not specifically defined in the legislation. Rather it is a term that refers to all other areas of legal service not reserved, i.e. not restricted to authorised legal professionals.

Authorised legal professionals are those professionals authorised by legislation to provide reserved services, namely: solicitors (and solicitor advocates); conveyancing practitioners; executry practitioners; notaries public; advocates; and commercial attorneys.

Unauthorised legal professionals are any other legal service professionals who are not authorised by law to provide reserved legal services.

Regulated professionals are those professionals (authorised or unauthorised) regulated by a one or more professional organisations, industry standards or government regulations.

In terms of the regulated providers Europe Economics provides the following diagram.



As for “unauthorised providers” of legal services, the Europe Economics study describes those as follows:

- professionals who are regulated with respect to carrying out certain types of legal activity, but cannot provide reserved legal services. In Scotland, these are persons providing immigration advice and insolvency services
- professionals who are regulated in another sector in which they operate. For example, a bank may provide ancillary legal services relating to money and debt issues (e.g. mortgages), with the bank regulated by relevant financial statutes and the Financial Conduct Authority
- professionals who are unregulated but employed by a regulated professional (most likely a solicitor)
- professionals who are unregulated and not employed by a regulated professional, and who do not work in another regulated sector. However, a number of these may be subject to voluntary industry standards or oversight by voluntary professional associations. Many unauthorised professionals in the not-for-profit sector will be working in organisations which are accredited by the Scottish Government’s Scottish National Standards for Information and Advice Providers

In Scotland, there are six types of authorised legal professionals who can provide reserved services:

- Solicitors (and Solicitor Advocates)
- Advocates
- Commercial Attorneys
- Conveyancing Practitioners
- Executry Practitioners
- Notaries Public

Today it is estimated that there are around 11,500 practicing solicitors, 450 practicing advocates, 350 solicitor advocates and fewer than 10 practicing members of the Association of Commercial Attorneys. Data supplied by the Law Society of Scotland in 2017 indicates that there are around 1160 solicitors firms in Scotland: 995 of these have 3 partners or less with 650 of these sole traders. At the other end of the spectrum, only 40 firms have 10 partners or more.

Advocates and solicitor advocates have extended rights of audience to appear before the Supreme courts (the High Court of Justiciary, the Court of Session and also the UK Supreme court), they may also appear in the Sheriff Court. Solicitors may represent clients in the Sheriff Court and instruct

advocates or solicitor advocates to appear for their client’s case in the Supreme courts. Solicitors can perform a broad range of services for clients across the spectrum of advice, dispute resolution and litigation. Third sector advice providers such as Shelter or the Citizen Advice Bureaux provide services in a range of fields.

There is a not-for-profit legal sector in Scotland, made up of Law Centres and third sector advice providers. Unauthorised/un-regulated legal professionals may be individuals with or without legal qualifications, who provide advice and services in both the private and the not-for-profit sector however this figure is difficult to ascertain due to its nature. As part of the remit of this Review was to undertake specific research into these sections of the market further consideration follows.

Current landscape for ownership of a legal firm

Currently ownership of legal practices remains restricted by the traditional partnership model, whereby to own a legal practice one must be a solicitor and have undertaken the Law Society’s practice management course. However regulations are due to come into force in 2019 to remove restrictions which previously prevented solicitors entering into business relationships with non-solicitors, allowing both investment by non-solicitors and external ownership, enacting the relevant section of the *Legal Services (Scotland) Act 2010*.

Advocates work on self-employed basis and are prohibited from going into partnership with others.

Economic contribution

The 2018 Europe Economics study was unable to draw firm conclusions that there were differences between “authorised” and “unauthorised” providers in terms of entry barriers, information provision or prices. The report found asymmetry of information in the legal services market particularly pronounced and highlighted the concern that this could result in a range of negative impacts for consumers, e.g. people not getting the help they need. The Europe Economics study suggests that possible interventions could be in the areas of market entry, to free up the market, initial investigation of conduct complaints by firms themselves, a balance between pricing and

advertising considerations and rules on ownership or control of firms to provide better consumer choice.

As to demand and value of the sector, market information, consumer and regulatory trends *TheCityUK Report: UK Legal Services (July 2016)* estimates that the UK legal service market is worth £25.7 billion and the Scottish share of that worth £1.7 billion. The Law Society of Scotland quotes a similar figure, accounting for inflation, in its paper *The Case for Change* and in its response to the Call for Evidence. A figure from the *Scottish Annual Business Statistics 2013* indicates that the legal sector contributes £1.48 billion to the Scottish economy. Whilst there is insufficient research to put a single definitive figure on current value, the range these figures offer us of £1.48 to £1.7 billion a year does evidence the significant contribution of the legal services sector to the Scottish economy which should be unhindered by dated legislation and processes in order to thrive.

The future value of the market to the economy, needs to be viewed against a backdrop of a declining domestic market for litigation services, which has seen a 44% drop in civil actions initiated in the Scottish courts since 2008 (*Scottish Government, Civil Justice Statistics in Scotland 2016-17*) and a fall in police recorded crime of 35% since 2008-09 (*Scottish Government, Recorded crime in Scotland, 2017-18*). Globally, the backdrop is one of market trends which are changing the way in which consumers want to purchase and interact with legal services and parallel regulatory reforms.

Regulatory system for legal services in Scotland

There are five main regulatory bodies, the Law Society of Scotland, the Faculty of Advocates and the Association of Commercial Attorneys, who are also membership bodies. The others are the Scottish Legal Complaints Commission and the Scottish Solicitors Discipline Tribunal.

The Europe Economics study republished the diagram on page 6 of the regulatory system, from a previous Europe Economics report – “*Economic research into Regulatory Restrictions in the Legal Profession: A Report for the Office of Fair Trading in 2013*”. The diagram is useful to understand the overall regulatory structure; however the complexity of the regulation of individuals, entities and activities,

including the complexity of the complaints and redress system cannot be encompassed in an overview diagram.

Entry to the legal profession in the current landscape

There are differing entry qualifications, standards, continuing professional development requirements and monitoring systems in place for the various professionals providing legal services in Scotland. These are set by the current bodies which both regulate and represent members and are currently as set out below:

Solicitors

There are three categories of solicitor membership of the Law Society of Scotland:

- roll only member.
- non-practising Members of the Law Society of Scotland
- practising Members of the Law Society of Scotland

In terms of practising as a solicitor a person must:

- have been admitted as a solicitor
- have their name on the roll
- subject to certain exceptions in the Solicitors (Scotland) Act 1980, have in force a practising certificate issued by the Society

In terms of the practising certificate, the Law Society of Scotland states in *the Case for Change* “*The practising certificate demonstrates that the solicitor is of good standing, has the necessary indemnity insurance and is fully qualified and competent to practice.*”

I found a lack of clarity even amongst some senior solicitors on whether they were required to have a practising certificate only if they worked in those areas reserved to solicitors or if a certificate was required to work in unreserved areas. This current complexity around the status of practicing and non-practicing solicitors also puts consumers at disadvantage.

The current complexity around the practising and non-practising status of solicitors should be reduced and the system should be simpler in order to improve consumer and provider understanding around their regulation including complaints arrangements.

Currently part 2 of the *Admission as Solicitor (Scotland) Regulations 2011* sets out that someone is admitted to the Law Society of Scotland if “he is a fit and proper person to be a solicitor”, and holds appropriate qualifications.

There are a number of stages in a solicitors’ career where they will be required to satisfy the fit and proper criteria:

- application for an Entrance Certificate
- admission to the Roll for the first time
- application for Restoration to the Roll at any time
- application for a Practising Certificate having not held one for 12 months or more

Law Society of Scotland guidance sets out the indicators of whether a person is considered ‘fit and proper’ to be a solicitor and this includes such factors as personal integrity, lawful behaviour, and financial probity.

Entry routes

Currently there are three possible entry routes to become a solicitor:

- **Standard route:** Four year LLB law degree, followed by a one year Diploma in Professional Legal Practice, and finally a two year traineeship.
- **Accelerated route:** Individuals who hold a degree may be able to undertake an accelerated two year postgraduate LLB, followed by the one year Diploma in Professional Legal Practice, and finally a two year traineeship.
- **The Professional Education and Training or “Pre-PEAT” traineeship:** Individuals working in a solicitor’s office while studying exams and completing a three year work based learning module set by the Law Society, followed by the one year Diploma in Professional Legal Practice, and finally a two year traineeship.

Advocates

All advocates are members of the Faculty of Advocates. The membership of the Faculty includes practising members, non-practising members, retired judicial members and honorary members. Only practising members may exercise rights of audience as advocates.

Entry route

The process of admission as an advocate requires a candidate to meet academic and practical criteria set by the Faculty of Advocates. Much of the academic criteria are met when graduating with a law degree and there is therefore an emphasis on meeting the practical requirements.

The standard route for becoming an advocate involves first becoming a solicitor, and then a:

- period of training with an experienced advocate (known as “pupillage” or “devilling”) which is unpaid; and
- pass in the Faculty’s examination in Evidence, Practice and Procedure.

Solicitor advocates

Solicitor advocates are regulated by the Law Society of Scotland and have extended rights of audience. The process of becoming a solicitor advocate is set by the Law Society of Scotland.

Solicitor advocates have to comply with the general standards expected of all solicitors in relation to the quality of service provided and the standard of conduct shown. This includes important ethical practices such as confidentiality, honesty and integrity.

Solicitor advocates also have to comply with rules and codes of conduct specifically relating to solicitor advocates.

Entry route

A solicitor who wishes to become a solicitor advocate must complete a course including obtaining oral and written assessments and exams. The Law Society *Rights of Audience Sub-Committee* must then decide whether the candidate is granted extended rights of audience, the final stage is *Introduction to Court*. It is not possible for a solicitor to exercise their extended rights of audience prior to this.

Association of Commercial Attorneys

Commercial attorneys have a statutory right to represent litigants in courts in relation to construction and building law.

Entry route

To become a Member of the Association of Commercial Attorneys the Admissions Board must be satisfied that the individual possesses a relevant legal qualification, a professional/construction qualification, relevant construction experience, relevant litigation experience and practical legal training.

Complaints Framework

The complexity of the current legal services complaints framework is powerfully demonstrated in the diagram at page 8 originally produced for “#ReimagineRegulation: Priorities for a consultation on legal services regulation”, the Scottish Legal Complaints Commission paper of July 2016:

Particularly pertinent in this “#ReimagineRegulation” paper, are the many concerns about the multi-faceted, multi-agency process, time taken and cost proportionate to case:

“At the moment there is a hugely complex path and set of tests applied to complaints about legal services in Scotland. Even a simplified diagram highlights the problems.”

“The first step for a consumer travelling through this process is to make a complaint direct to the firm or lawyer, who carries out an investigation, and makes a decision, letting the person who has complained know the outcome.”

“When a complaint comes to us. We may decide it has a mix of ‘service’ and ‘conduct’ issues. We also have to decide at this stage if the complaint is ‘eligible’, applying several tests set out in legislation (although this can be challenged, and we can end up at the Court of Session on appeal even at this stage).”

“We then investigate, try to settle (through conciliation, or optional mediation, or sometimes both).”

“All of this may relate to a complaint about whether or not a house purchase should have included £200 of kitchen appliances.”

SCOTTISH LEGAL COMPLAINTS COMMISSION, JULY 2016

A conduct complaint must go through the first tier process. If the outcome is unsatisfactory, the complaint must then be lodged with the Scottish Legal Complaints Commission, who then pass the complaint to the Law Society of Scotland for investigation and if a hearing is required it is then submitted to the Scottish Solicitors’ Discipline Tribunal. Thus a conduct complaint may potentially be passed between three statutory bodies before resolution, which may result in a legal professional being subject to a complaint hanging over their head for months, and in worst case scenarios years. We heard evidence of the understandable stress and distress this causes to a professional who may be innocent of any wrong doing. There is also an issue where this person is still practicing when they may be guilty of serious misconduct.

Change in legal services regulation in Scotland in recent years

There have been various recent reviews of legal services in Scotland including the *Report by the Research Working Group on the Legal Services Market in Scotland, May 2006* and the *Scottish Parliament's Justice 1 Committee's Report in 2002 on Regulation of the Legal Profession Inquiry* which prompted the last round of significant reform of the regulation of legal services in Scotland and culminated in the creation of the Scottish Legal Complaints Commission in 2007. The consumers' organisation Which? also lodged a *super complaint to the Office of Fair Trading in 2007* stating that the regulation of Scottish legal firms restricted choice to consumers and prevented the formation of alternative business structures. Reforms were also pushed forward to increase competition including the creation of the Association of Commercial Attorneys. The *Legal Services (Scotland) Act 2010* aspired to take this further making provision for Alternative Business Structures, these provisions have yet to be implemented. The *2010 Act* also provided for a regulatory committee within the Law Society of Scotland with a lay majority in order to clearly demarcate its regulatory and representative activities.

Regulation in England and Wales

The legislative framework for the regulation of legal services in England and Wales is set out in the *Legal Services Act 2007*. This was enacted following the Review by Sir David Clementi in 2004. The Clementi Review found that existing regulatory arrangements were inconsistent, complex, lacking objectives and underpinning principles and had insufficient regard for the interests of consumers.

The *2007 Act* had three main aims:

- a more effective and simplified regulatory framework with a dedicated oversight regulator (the Legal Services Board) responsible for overseeing Approved Regulators
- a more effective, independent complaints mechanism through the Office for Legal Complaints (which administers the Legal Ombudsman scheme)
- a more effective and competitive market through Alternative Business Structures

When Sir David Clementi conducted his Review he considered a range of options. The subsequent legislation produced a new system which is still in place today. It is a hybrid system with eight regulators and a "super-regulator", the Legal Services Board and covers around 200,000 professionals. The two largest frontline regulators are the Solicitors' Regulatory Authority which is responsible for the regulation of around 170,000 solicitors and the Bar Standards Board responsible for around 17,000 barristers.

Chapter 4

IS THERE A CASE FOR STRATEGIC CHANGE?

Introduction

This chapter outlines the changes that the Scottish legal sector has undergone in recent years and the records many voices from the professional, regulatory and consumer perspective who believe that the regulatory model requires to be more flexible, proportionate and to be modernised to ensure that it is fit for the future. It also considers the findings of the User Research and Consumer Study we commissioned.

WHAT THE SECTOR AND CONSUMER GROUPS TOLD US

The Law Society of Scotland

The Law Society of Scotland submitted their *Case for Change to Scottish Ministers* in December 2015, which set out proposals for developing primary legislation that would deliver reforms to the regulatory powers of the Law Society. The stated intention behind those proposals was to support growth in the legal services sector, through a more modern and proportionate approach to regulation, and to strengthen consumer protection.

The Law Society argued that legal services are an essential part of a strong economy and the regulatory framework required modernisation to take account of recent developments in the way in which legal services are provided in other jurisdictions. It said that the existing regulatory framework put the legal services market in Scotland at a competitive disadvantage.

The Society's 2015 paper also made the case that the regulation of the legal services market is central to consumer protection, supported by three main principles which the Society considered a regulatory framework must contain:

- controlling entry into the profession, setting qualification standards and administering authorisation to practice
- the conduct of the profession, rules of professional conduct and monitoring these
- a complaints and redress system.

The paper made the point that the current *Solicitors (Scotland) Act 1980* was out of date and had been amended by piecemeal legislative change since then. It pointed out that the legal market had changed out of all recognition in terms of the move away from traditional high street solicitor firms (albeit that they do still exist and provide an important local service) towards cross-border firms, new business areas, internationalisation and new technology.

The Law Society also sought new powers to allow for the regulation of "entities" through a licencing system. Its paper suggested that the traditional partnership firm is largely unregulated as an entity, although the framework for the Scottish Legal Complaints Commission does regulate the profession at firm level. Regulation powers of the Society seemed to be restricted to financial inspections and the requirement for firms to have professional indemnity in place. A system of licensing entities would allow for requirements such as management training, quality control systems and better complaints processes. In its January 2018 paper, "*The Case for Change: Revisited*", the Law Society suggests that the single gateway for complaints be abolished, with either body able to receive complaints, and pass on complaints where appropriate. That would be similar to the arrangement in England and Wales between the Legal Ombudsman service and the Solicitors Regulation Authority.

Further points of reform proposed by the Law Society of Scotland include:

Regulation of Scottish solicitors outwith Scotland

The Society noted that while there have been a number of mergers between Scottish and English law firms and against the background of an ever increasing number of international law firms who operate here, it cannot currently regulate Scottish solicitors and firms operating in the rest of the UK or abroad.

Provisions and powers to deal with structural changes designed to put firms' activities outside regulation

The Society believe that some businesses are employing solicitors to provide advice to clients directly while the firms themselves remain unregulated. Their business model may advertise themselves as, for example, 'employment law consultants', and they may employ solicitors as in-house lawyers who in reality advise and represent clients of the business directly. The business is unregulated even though the solicitor will be subject to its regulation.

More responsive regulation

The Society argues that the existing governance framework does not permit it to take a modern, proactive, risk-based approach to regulation. It considers that effective consumer protection needs a more nimble and proportionate approach to regulated entities and individuals.

In addition to the Law Society revised *Case for Change in January 2018* they also provided a response to our Call for Evidence.

The Scottish Legal Complaints Commission

The starting point for the 2016 Scottish Legal Complaints Commission's policy paper "#ReimagineRegulation" was its view that "*the current arrangements for legal complaints, and how complaints outcomes are used to improve standards in the legal sector, are too complex, involve too many stages, and pass through too many organisations*". It believes that "*faster, more efficient and better targeted regulation can be delivered to the benefit of consumers and the sector, by significant legislative reform*".

"We want to unravel the current complaints maze to create a clearer route to consumer redress – faster for the consumer, and more cost effective for the sector."

The Commission's paper set out the following priorities to be tackled:

Inflexible, unresponsive, legalistic

"We need to dismantle a statute that focusses more on processes than outcomes, and build a system on agreed principles that delivers for consumers and the sector."

The paper suggests that a new model should be considered, and one that allows the widest possible discretion to the complaints bodies, while ensuring safeguards. It suggests three key issues for debate:

- areas of legal regulation meriting legislation, based on better regulation principles
- the specific high level principles for what is trying to be achieved with complaints and redress in the sector – an independent process, fair to all parties, efficient, effective proportionate to the complaints
- how rules are set by complaints bodies specifying the process(es) if there is less detail in statute, for example a statutory duty to consult

Avoidance, Evasion, Delay

"When compensation is awarded to a consumer this must be paid – anything else is a failure in regulation and undermines confidence in the market and in lawyers."

This section of the paper relates to situations where compensation is awarded but is not received by the complainant, for reasons that the paper sets out clearly. It also considers how complaints against unfair fees are currently dealt with.

The paper sets out two issues for debate here:

- the principle that compensation awarded by a statutory body should always be paid to the consumer, and the best methods of delivering this
- how best issues of unfair fees can be addressed – improving access to "taxation" or awarding new powers to another body capable of addressing this key consumer issue

Unfocused, disproportionate, risk-naïve

“We believe it’s time to stop seeing a single market, and use the data from thousands of complaints to tackle the high risk areas which every year cost consumers and the professions millions.”

“A common theme in our discussion with stakeholders was that different statutory agencies around Scotland have access to data on lawyers which may link to risks for consumers. There were often stringent rules inhibiting the sharing of data, coming from specific legislation or due to data protection. It was commonly felt that this inhibited risks being tackled.”

The Scottish Legal Complaints Commission has limited powers to manage risk in areas where there is a higher volume of complaints and this does not allow for preventative work that would improve performance.

The paper seeks debate on whether it is time to:

- move from “one size fits all” regulation to a focus on the areas of greatest consumer risk
- engage consumers, lawyers and experts on the approaches that would tackle these “high risk” consumer areas
- consider the core statutory functions for each body in the sector and what discretion they have for other work beyond that

Choice, access, information

“Consumer principles should be at the heart of a consultation on legal regulation.”

The Commission believes that an approach which focuses on the consumer from the start may help manage expectations and ensure consumers have information to make informed choices, and so reduce some of the common causes of complaints.

The paper suggested three points of debate here:

- the appropriate balance between “professional regulation” of individuals and “market regulation”
- how to ensure the consumer principles are delivered to assist in a thriving and sustainable market

- whether an amended version of the regulatory and professional principles in the Legal Services (Scotland) Act in 2010 should be applied to all aspects of legal regulation

Analyse, learn, improve

“In the era of “big data” we believe regulation should focus on learning from complaints, and assessing and managing risk, based on good market intelligence.”

The paper sets out the potential for using data and intelligence to improve standards and manage risk. It suggests three points for debate here:

- how it can be ensured that learning from complaints improves standards for all clients
- whether the Commission should have the power to issue rules on how lawyers should handle complaints at first tier, and the power to impose “strict liability” offences where lawyers do not have, or follow, their own internal process
- how better information and intelligence sharing might be delivered and lead to risk reduction for consumers

Faculty of Advocates

The Faculty of Advocates in its response to the Call for Evidence to the Review stated that it is “largely content with the current regulatory regime applicable to the provision of legal services by its members, subject to certain important exceptions”. In particular it emphasised the following:

Existence of the independent referral bar

The Faculty does not agree with the assessment of the Office of Fair Trading (*in their response to the Which? Super complaint, July 2007*) that advocates should be able to enter into partnership with others, allowing for efficiencies and streamlining of processes, which may result in reduced costs to clients, and may not be available to independent practitioners. The Faculty sees this as a threat to the independent referral bar, and cites Faculty Services Ltd (the company which provides professional services and to which over 90% of advocates contribute a fixed percentage of their income) and shared facilities such as the Advocates’ Library as examples of streamlined processes available to advocates. The Faculty also believes that direct

instruction of advocates by members of the public, extending the current rules, is not necessary, or desirable in the interests of justice.

Discipline and complaints handling

The Faculty would seek to retain conduct complaint handling of advocates and take over service complaint handling from the Scottish Legal Complaints Commission.

The Law Society of Scotland and the Faculty of Advocates currently both have a disciplinary tribunal.

Scottish Solicitors' Discipline Tribunal

There is a perception that the processes of the Scottish Solicitors' Discipline Tribunal like the Scottish Legal Complaints Commission are unnecessarily complex and take too long to draw matters to a conclusion, causing significant stress to the solicitors concerned.

There is also a perception that the process lacks transparency and contain inbuilt bias. The Scottish Solicitors' Discipline Tribunal acknowledged these points in its response to the Call for Evidence, saying that:

“There should be much swifter action as regards legal professionals who have breached codes of conduct to prevent potential exposure of other users of legal services to the same harm. There is a perception among complainers that both the Scottish Legal Complaints Commission and the Law Society are on the side of the solicitor. Legal members of the Tribunal are recommended for appointment by the prosecuting body – the Law Society of Scotland. This creates an appearance of bias. The Tribunal is funded indirectly by the Law Society of Scotland. The Law Society funds the company which services the Tribunal. Both bodies work hard to maintain the independence of the Tribunal and the Tribunal is satisfied that no actual bias occurs.”

A streamlined transparent process understood by consumers and solicitors is required.”

Unlike the Law Society of Scotland, the Scottish Solicitors' Discipline Tribunal favours the single gateway for complaints, saying that:

“There should continue to be a single gateway for all legal complaints in Scotland. At present that function is performed by the Scottish Legal Complaints Commission. Given the potential for debate about what constitutes a service or conduct complaint, a single gateway creates consistency in decision making and limits the potential for confusion and ‘forum shopping’ by the complainer.”

Consumer Groups

In its response to our Call for Evidence the consumers' organisation, Which? said:

“Consumers should have one place to go to complain about legal services – this could be the Scottish Legal Complaints Commission or another Ombudsman. This body should be able to resolve consumer complaints about the sector and have a range of powers including awarding financial redress and compensation. The legislation underpinning the redress body should provide a robust framework without being prescriptive.”

Citizens Advice Scotland in its response to the Call for Evidence said:

“The original intentions of the 2007 Act – that access to redress should be straightforward, free and independent – should be retained and built upon. (...) The Scottish Legal Complaints Commission Consumer Panel, of which CAS is a member, has voiced concerns about the complexity of the legal complaints process, partly as a result of the current legislation but also due to the subsequent Court of Session interpretation. (...) the perceived complexity of the process may be deterring consumers from making or pursuing complaints (...). While consumers have free access to making a complaint about legal services, issues around complexity, information asymmetry, language, and speed of the process can all act as barriers to access. The consumer experience of making legal complaints would benefit from further research – particularly around access to the system, any barriers they face, their experience of any delays, and satisfaction with outcomes.”

In its response to our Call for Evidence the Scottish Legal Complaints Commission's consumer panel said:

“One of the major shortfalls we identify in the current process is the duplication caused by different bodies being involved in the process and, in some cases, investigating different aspects of the same complaint – duplication to any degree inevitably builds delay into the process.”

The Scottish Legal Complaints Commission's Consumer Panel also went on to raise concerns that people in vulnerable situations will not be able to engage with the complaints system and that for the “non-legal” individuals it is too jargonistic. It also noted that, “*The most recent data provided to us by the Scottish Legal Complaints Commission shows that the average time to conclude a complaint is over 10 months. This does not include cases which are then also investigated by other bodies, such as the Law Society of Scotland or the Faculty of Advocates.*”

Legal Firms

Thorntons Law LLP in its response to our Call for Evidence said:

“A single complaints body should be established. Our own experiences leads us to believe that this would be more effective and efficient; result in better clarity for consumers, clients and others; and, enable comprehensive analysis of complaints for the purpose of continuous learning and improvement”.

On the subject of the complaints system Harper Macleod LLP in its response to the Call for Evidence said:

“The current model doubles the timeframe for completion and doubles the cost to the profession.”

WHAT THE USER RESEARCH AND CONSUMER STUDY TOLD US

Consumer law and principles

My remit also asked that I consider protecting the public and consumer interest. Therefore consideration of regulation that delivers recognised consumer principles has been a key element of the Review.

The Consumer Principles

The Consumer Bill of Rights pushed for by John F Kennedy in his 1962 speech to the US Congress established four basic rights; the right to safety, the right to be informed, the right to choose, and the right to be heard. These rights formed the basis of the Consumer Principles, a set of tests used since then by consumer organisations across the world to assess whether goods or services are being provided in the consumer interest.

Access

Can people get the goods, services or information they need?

Choice

Can consumers affect the way goods and services are provided through the choices they make in the marketplace?

Information

Is information available, is it easy to understand, and does it help consumers to make informed choices?

Quality and Safety

Do goods and services meet acceptable standards?

Redress

Is there a simple, cheap, quick and fair system for dealing with complaints and disputes if things go wrong?

Representation

Are consumers' views properly represented in services where there is little or no choice? And is the process of decision-making transparent?

Fairness and Equity

Are some, or all, consumers unfairly discriminated against?

The UK-wide *Consumer Rights Act 2015* consolidates existing consumer law. It provides consumers with statutory rights: for services to be performed with reasonable care and skill; for consumers to pay a reasonable price for a service; and for services to be performed in a reasonable time.

In relation to legal services, the *Scottish Legal Complaints Commission Consumer Panel* sets out specific principles to underpin that move as follows:

- Access – Access to the services you need
- Choice – Free choice of a range of service providers
- Quality – Excellent legal and customer service
- Information – To help you make effective choices
- Fairness – To be treated fairly by your legal services provider
- Representation – You should have a say in the way that you receive your legal services—for example the form or regularity of communications. You should also have a voice in the way that regulation works
- Redress – Access to independent and effective redress

USER RESEARCH

Scottish Government consumer study on Scottish users of legal services

As mentioned in my introduction, a small qualitative research study was commissioned and undertaken in spring 2018 to investigate people's experiences in accessing legal services across Scotland. The study – *Consumer Study on Scottish Users of Legal Services (2018)* – covered a mix of rural and urban participants and those paying solicitors privately or using legal aid and non-profit advice providers. No areas of law or types of providers or services were excluded at the outset so that participants' stories and experiences could freely emerge.

The findings of the study reinforce the perception that people are very confused about whether the solicitor they are using is a regulated provider as well as being confused more generally about the titles of "solicitor" and "lawyer." Users inform themselves to be able to deal with the legal system by consulting friends and family members or online resources – this includes identifying a provider of legal services. Cost and location are the main factors when choosing a provider. Users feel that the legal

world is full of jargon and that this creates a power imbalance in the relationship where solicitors hold the stronger position. Even when dissatisfied with their legal services provider at times, some users do not complain. Users cannot always make sense of the services they receive from their solicitors even after the outcome has been received. Users feel that for certain standard tasks such as conveyancing, solicitors should have a consistent pricing model, and they should be able to advise of the costs upfront.

Interviews were also carried out in a sub-study with Scottish Legal Complaints Commission staff to seek insight into how consumers may perceive the experience of the complaints process and some of the supplementary insights from that part of the study were that poor communication including jargon is a constant theme but that also, conversely taking time to communicate (calls, face to face meetings) has an impact on fees.

As well as reinforcing many of the views expressed and set out above the user research commissioned for the Review also underlined that people may have lost faith in the complaints process. The main findings of the sub-study on the complaints process were that:

- consumers may have unrealistic expectations and a lack of clarity around fees when they use solicitors
- solicitors may be felt to be in a position of power and/or unresponsive/defensive
- poor communication (and possibly the feeling of power asymmetry) is amplified by the use of legal jargon
- people may feel that they have not been treated fairly
- people may wish to ensure that what happened to them does not happen to others
- people may wish the solicitor being complained about to experience the distress they caused
- people may be using the complaints process to work out what happened in their case if they did not understand it at the time
- people may be interested in compensation for loss

The areas suggested for change from the study were:

- improving solicitor communication and behaviours around customer service
- improving the eligibility stage for complaints and the time taken to deal with them

Of all complaints, 65% are completed in under one year and 90% in under 18 months.

England and Wales

Following the Review by Sir David Clementi and the Legal Services Act 2007, Professor Stephen Mayson in his online paper, "*Clementi 10 years on (and now for the next 10)*" (Mayson S, 19 December 2014) wrote that:

"The government has challenged all regulators to remove unnecessary regulation and both the Ministry of Justice and the Legal Services Board have emphasised how important this is. The competition work appears to have stalled with one contributing factor likely to be the demands of a Brexit-heavy legislative agenda on the UK Parliament. The Competition and Markets Authority and the Legal Services Board have raised the issue of the future structure of legal services regulation in recent times, particularly the separation of frontline regulators from professional bodies."

Professor Mayson sets out that the main aims of the Legal Services Act 2007 (listed previously) have been achieved. He believes that the Clementi Review and the 2007 Act were necessary steps to encourage market liberalisation that "*was long overdue in legal services*". He writes that, "*Contrary to some predictions, the sky has not fallen in: law firms have not been taken over en masse by crooks and charlatans; lawyers' ethics have not been abandoned in the pursuit of profit; and the price and quality of legal services have not plummeted to the lowest common denominator*." On the global economic environment he goes on to say that "*Consolidation, better and more extensive use of technology, alternative providers, value pricing and project management have all driven restructuring, mergers, the need for capital investment, and the reshaping of traditional partnerships and their distorted profit-sharing arrangements*." He does not believe that the Clementi reforms created "*a liberated free-for-all. They were not the pursuit of consumerism and profit at the expense of everything else; nor were they the end of professionalism and ethics in legal practice. They were part of the enabling framework that allowed a new future to evolve*."

Professor Mayson concludes that the 2007 Act will need to be overhauled again to be fit for the next ten years. In his words, "*the independence of regulation from professional representation is not complete*". In July 2018 it was announced that Professor Mayson would be undertaking a Review of legal services regulation in England and Wales with colleagues

at UCL Centre for Ethics and Law to explore issues raised by the *Competition and Markets Authority 2016 study: Legal Services Market Study: Final Report* including the needs of consumers, small businesses, and a more risk-based, flexible and sustainable regulatory framework. Conclusions are expected to be presented to the Ministry of Justice in 2019.

In November 2015, the UK Government in a document issued jointly by HM Treasury and the then Department for Business, Innovation and Skills "*A Better Deal: Boosting Competition to Bring Down Bills for Families and Firms*" it was announced that the *Ministry of Justice would consult on removing barriers to entry for alternative business models in legal services and on making legal services regulators independent from professional representative bodies*. The underpinning rationale is to support a "*fairer, more balanced regulatory regime that encourages competition, making it easier for businesses such as supermarkets and estate agents amongst others to offer legal services like conveyancing, probate and litigation*". Since then, there has been a *consultation by the UK Government in July 2016 on amending the 2007 Act on Alternative Business Structures, "Legal services: removing barriers to competition"*, focusing on reducing barriers to the licensing of and regulatory burdens on Alternative Business Structures, bringing the legislative framework for these businesses more in line with that of other legal services businesses. It restates the importance of competition to promote economic growth and consumer choice and the importance of a well-functioning legal services market to ensuring greater access to justice.

The Law Society (for England and Wales) is consulting its members on the Government's proposals to separate the various legal services regulators from their professional bodies, for example by separating the Solicitors' Regulatory Authority from the Law Society and it favours professional standards being the responsibility of the profession with compliance with regulatory rules being the responsibility of the regulator.

The UK Government intends to consider the detail and timing of a further consultation on regulatory independence in the context of the *Competition and Markets Authority study* into the legal services market. The Study's terms of reference focused on the themes of:

- consumers driving competition by making informed purchasing decisions

- whether consumers are protected from harm and can seek satisfactory redress if legal services go wrong
- how regulation and the regulatory framework impact on competition for the supply of legal services

The Competition and Markets Authority found that the legal services markets in England and Wales are not functioning as well as they might and there is a lack of transparency of price and service making it harder for consumers to compare providers and identify value for money. It made remarks in several key areas, including:

- markets are largely local with a lack of advertised information online
- there is limited price competition and inherent difficulties in signalling quality especially before purchase of services
- provision of legal services remains fragmented in contrast to larger corporate or high volume segments of the legal sector which have greater potential for commoditisation including standardised fees
- there needs to be improved clarity around consumer redress mechanisms and the handling of some complaints
- there are limited regulatory barriers to market entry although the financial cost of some regulations may be disproportionate to the consumer benefits they achieve – costs should not discourage currently unregulated providers from becoming regulated
- the majority of legal provision falls outside the reserved areas however unregulated providers may be able to e.g. outsource reserved elements of the work to a regulated provider

The Competition and Markets Authority suggests that the main challenge currently is a lack of transparent information from suppliers on price and quality and it has considered focusing on measures to improve consumer awareness of the regulated status of providers and the differences in consumer protection. It suggests incremental changes to the current regulatory framework and remains open to a move to an alternative regulatory model that might lead to benefits. It believes that regulation should be proportionate or in other words “risk-based”. The Competition and Markets Authority would consider extending regulation to specific unregulated activities but only where there is clear evidence of detriment to consumers.

The Competition and Markets Authority wishes to drive changes to supplier behaviour to help consumers to compare prices and quality both before and after consumers engage a provider, in the latter scenario to improve consumers’ visibility of the total cost of the legal service they have sought and to reduce the level of dissatisfaction and complaints arising from unexpected costs. The Authority will also seek ways to improve consumers’ awareness of factors such as the different types of legal service provider, the differences between regulated and unregulated providers and how to make a complaint. It believes that there should be full independence of the regulator from the providers it regulates.

Although the regulatory landscape in England and Wales is very different from that in Scotland, some of the concerns that led to the study could be said to be shared including: perceptions that there is unmet demand; concerns about service standards offered by both regulated and unregulated providers of legal services; standards for market entry and rules around provider conduct and complaints; and providing enough information to drive consumer choice and thus competition on price and quality.

In my discussions I found that there was widely shared concern that the system was still too complex and that some of the frontline regulators were too small to have the capacity to deliver their responsibilities effectively. There was also some concern that providers having the freedom to choose which organisation to be regulated by could create the perception that they would choose the cheapest and least rigorous.

On balance, the majority believed a move towards independence of the regulators from those they regulate, as recommended in the Competition and Markets Authority report is inevitable. There were a variety of views about the desirability of this and about the likely structures that would be adopted.

International trends and developments in regulation

Current good practice in regulation includes a focus on embedding the public, consumer and market interest in regulatory frameworks.

From available evidence there is a shift around the world and across recognised professions towards approaches such as risk-based regulation,

principles based regulation and “smart regulation” (*Understanding Regulation: Theory, Strategy and Practice, Baldwin, Cave and Lodge (Oxford, 2012)*). Regulatory systems can mix different approaches and blend different sets of tools and logics depending on the outcomes required. The regulatory outcomes, objectives, approaches and purpose should work in tandem with any statutory framework.

Baldwin, Cave and Lodge description of Principles-based and Risk-based regulation is as follows:

Principles-based regulation is where “*principles are used to outline regulatory objectives and values and those regulated are left free to devise their own systems for serving such principles.*” It provides a flexible and responsive approach.

Risk-based regulation frameworks “*look principally to control relevant risks, not to secure compliance with sets of rules. They establish priorities in a manner that makes selective decisions clear and they aim to provide a logical structure within which decisions can be understood and explained.*” Risk profiles can be developed for example around themes, or the activities undertaken, or risk-profiling the track record of entities and individuals.

As Professor Andrew Boon says in *International Perspectives on the Regulation of lawyers and legal services (2017)*:

“In the Western world, markets that have been formed, shaped and dominated by legal professions are undergoing a variety of changes. The process may be dictated by government policy, driven by pressure exerted by economic forces, globalisation and technology.”

Evidence shows a trend away from self-regulation to co-regulation in relation to the regulation of many professions around the world, including legal services. When considering the co-regulatory spectrum, a trend toward more independent systems of co-regulation, or indeed fully independent regulators is growing. As there is no unified definition of co-regulation, a common sense approach is needed to assess features of different regulatory frameworks and judge how far along the co-regulation spectrum they may sit.

In several jurisdictions around the world, including New Zealand, Canada, Australia and Ireland, as well as England and Wales there have been regulatory reforms in recent years. Many jurisdictions are either considering or implementing a number of regulatory responses which include entity or activity regulation, calibrating risk for different individuals, entities or activities, and a move towards more independent structures to facilitate change. There are trends emerging that separate the representative and regulatory functions either within a body or between professional bodies/regulators. The inclusion of more lay representation to the boards of professional bodies/regulators and a strong trend to streamline rules (codes of practice) is growing internationally.

In terms of independent legal services regulation, the only example the Review has found is the Legal Services Regulatory Authority in Ireland which has been established but is facing some challenges. *Maeve Hosier* writes in their article “*Eire: The lawyers of the Celtic Phoenix*” (*Boon, 2017*) that the Bill that created the Irish regulator was significantly amended so that the agency may not have all the powers it needs. In it she goes on to say “*following its initial publication, the Bill was subjected to an onslaught of amendments, mainly secured on foot of a campaign orchestrated by the representative bodies of the legal profession. When the Bill was finally enacted some five years later, it was merely a shadow of its former self.*” The catalyst for a move to independent regulation of the legal profession came in response to the EU/IMF/ECB Memorandum of Understanding on Specific Economic Policy Conditionality 2010 which asked the Irish Government to remove restrictions to trade and competition in the legal sector and create an independent regulator.

In New Zealand, there has been a move away from professional body involvement in regulation towards more lay and government involvement. *Selene E Mize* states in their article “*New Zealand: Finding the Balance between Self-Regulation and Government Oversight*” (*Boon A, 2017*), “*There has been criticism of lawyers and a threat made to abandon self-regulation in favour of regulation by an independent government entity.*”

Developments in Scotland

The Legal Services Act 2007 was intended to address some of the issues covered by these developments in England and Wales. The equivalent Scottish legislation is the Legal Services (Scotland) Act 2010. One of the main aims of the 2010 Act was to remove restrictions which previously prevented solicitors entering into business relationships with non-solicitors, allowing both investment by non-solicitors and external ownership.

Consumer bodies argue that these restrictions inhibit competition and innovation in the legal services market. Many Scottish solicitors, and the Law Society of Scotland, believe that the restrictions on Scottish solicitors' business structures will increasingly inhibit the ability of that profession to compete in the UK and international markets. English solicitors have the ability to operate in an alternative business structure environment.

The 2010 Act provides for new legal entities to be known as Licensed Legal Services Providers which can comprise solicitors and/or other regulated professionals i.e. non-solicitor professionals such as accountants. Solicitors would require to hold at least a 51% majority stake in the business. They will be regulated by an Approved Regulator (the 2010 Act allows for a maximum of 3 Approved Regulators). The Law Society of Scotland has been approved by Scottish Ministers as an Approved Regulator.

It is anticipated that the introduction of alternative business structures to the legal services market will provide clients with a wider access to legal services and they will be able to expect the same standards of service, advice and consumer protection.

A competitive business environment has a vital role in a strong economy, stimulating investment, innovation and driving up standards. Increased competition allows Scottish firms to compete more easily at a UK and international level, and offers benefits to consumers such as lower prices, more innovative services, and wider choice.

However, the nature of legal services is such that the market cannot be the only regulating mechanism, and they must be appropriately regulated in the public and consumer interest.

The current framework has evolved from a partnership model which has historically proved

effective, however the last two decades have seen many changes in the legal sector, driven largely by advances in technology. With the UK exiting the EU in March 2019, Brexit is likely to drive further divergence of UK-EU competition law which will impact legal services to an extent we do not yet know.

Scottish commercial firms operate in a UK and international market therefore the ability to obtain external investment is key to ensuring that they can thrive against competitors.

At the time of writing, the section of the Legal Services (Scotland) Act 2010, which would for the first time allow solicitors to bring in external capital or to set up licensed legal services providers with other professionals, such as accountants, to broaden the range of services they offer their clients is yet to be implemented. This is in part due to a lack of a clear way forward in terms of how this may be regulated. I address this in the next chapter of my report on the new regulatory model and proposed regulator.

The Law Society of Scotland seeks a new flexible regulatory framework and view the present legal framework surrounding the Scottish legal profession as a patchwork of inconsistent and increasingly outdated legislation; it views the Legal Services (Scotland) Act 2010 as effectively unworkable.

The 51% majority stake rule for Licenced Legal Services Providers presents other difficulties in that there are threats to the sustainability of small firms and how removing this would allow scope for the possibilities around employee and community ownership which are now beginning to be considered as potential solutions where high street firms may be struggling.

On balance, and across the following key aspects of potential change opinions coalesced around the following:

Regulatory framework – There was some support for introducing risk-based regulation which was deemed to be more consumer focused, including more market principles, entity regulation, and more flexibility in the current framework. Some favoured retaining many aspects of the current framework as they are now, especially for entry to the legal professions including qualifications. Comments were made that unregulated providers should be subject to increased regulation and this included Claims

Management Companies but care needs to be taken not to overregulate the not for profit sector.

Other comments indicated support for more competition and choice in the market and for regulation not to create any barriers for firms to operate on a UK wide basis if they choose to. Responses from the Competition and Markets Authority, the consumers' organisation Which?, the Association of British Insurers, the Forum of Scottish Claims Managers and Professor Ken MacKinnon of Robert Gordon University supported the establishment of an independent regulator.

Provision and transparency – The sector is too jargonistic for consumers including access to services (understanding whether the legal provider you employ is a regulated professional or not) and in terms of the complaints process. There is confusion between the Lawyer and Solicitor titles. There is a lack of information on services the consumer is purchasing, including cost and quality. In particular, price transparency is a problem. Access to justice issues may persist in rural areas where there may be fewer solicitors firms. Some believed that alternative business structures could be detrimental to consumers in terms of a reduction in quality and a lack of regulatory protections. Others believed that it was necessary to provide a better chance of renewal in the sector.

Complaints system – The current legal complaints system is too complicated, both from the consumer and solicitor's perspective. There are too many duplicated layers of investigation and the process takes too long. There is a need for clarity and reform. Views differed on how this should be achieved including suggestions that there should either be a single investigation (whether the complaint includes conduct and/or service elements) or a single complaints body or that the professional bodies should retain competence for both service and conduct complaints with an independent Ombudsman able to intervene where necessary. Views differed on whether the single gateway should be retained. Some thought that powers to suspend solicitors suspected of serious wrongdoing should be increased.

Conclusion

We have around 11,500 practicing solicitors, 450 practicing advocates, 350 solicitor advocates and fewer than 10 practicing members of the Association of Commercial Attorneys. Our jurisdiction is small, however our regulatory structure is complex, inefficient and comparatively expensive. The latest annual report from the Scottish Legal Complaints Commission suggests that the number of complaints is increasing as is the levy on the legal sector. Finally, the ambition to enable the establishment of regulated alternative business structures is yet to be realised.

Regulation itself is reforming, both domestically and internationally, consumer protection is, rightly, achieving higher priority, and it is important that the legal sector is well served in this changing climate. The way in which business is conducted, including globalisation and technology, and the changing needs and expectations of clients provides challenge for the legal services market, but it also provides significant opportunities.

It is clear that the current regulatory framework is not able to meet the needs of all whom it serves. There is therefore a clear and pressing need for strategic change.



Chapter 5

VISION FOR THE FUTURE OF REGULATION OF SCOTTISH LEGAL SERVICES

This Chapter sets out my vision for a modern and effective legal services sector in which economic opportunity is maximised. Since the outset of my Review in April, my objective has been to recommend a regulatory framework that enables and supports a vibrant, high quality legal services sector in Scotland which:

- **upholds the rule of law**
- **provides access to justice**
- **protects the public and consumer interest**
- **has a high degree of public confidence and trust**
- **maximises the opportunity for the sector to increase its contribution to the Scottish economy**

I believe that the time is right to transform the regulation of our legal services sector. In doing so we should be ambitious for Scotland and grasp this opportunity to be a world leader and inspire other jurisdictions which are also considering change.

Scotland is home to a well-educated, well respected legal profession with a high degree of public trust, of which I believe we can be very proud.

There is significant diversity in the types of legal services people need to access. They often need these service in times of distress or vulnerability. At other times the need for legal services is transactional, such as conveyancing. There are also a whole range of commercial matters that are supported by legal services, from the small business to the multi-national corporation.

The provider landscape is also diverse: from those working in small high street firms to those in large Scottish or UK partnerships or to global/multi-national firms. Yet we currently have a one-size fits all model of regulation, with insufficient flexibility to adapt. We need a regulatory model that is adaptable to the wide range of legal services, providers and clients.

People in Scotland are entitled to have access to a wide range of high quality legal services, provided in a variety of innovative ways. They need a regulatory system that is as concerned with learning from mistakes and improving performance and standards as it is with dealing with failure. They, and legal services providers, need a swift, efficient and effective means of dealing with complaints and providing redress. Yet, the current regulatory model is predicated on dealing with failure, with insufficient flexibility to focus on prevention. The complaints system is unwieldy and ineffective.

The legal services sector needs a regulatory framework that supports and enables it to thrive and grow. One that empowers it to shape new markets, design new approaches and have its contribution to the economy of Scotland better recognised. Innovation should not be stifled by the outmoded or unnecessary limitations of a regulatory structure.

We also need a regulatory model that is proportionate. We are a small nation of around 5.4 million people and around 12,000 legal professionals in Scotland. Yet there are currently 5 organisations involved with regulation, discipline and complaints against legal services providers; the Law Society of Scotland, the Faculty of Advocates, the Association of Commercial Attorneys, the Scottish Legal Complaints Commission and the Scottish Solicitors' Discipline Tribunal.

There is little evidence of significant wrong doing in the current model. Yet, complaints are increasing and there is concern that Scotland is losing its share of the UK/ Global legal services market, and the power imbalance between client and provider is not improving.

We need a system that is modern, proportionate, flexible, forward looking and effective. Effective in ensuring that entry to the legal services market is set at the right bar, effective in driving up standards, effective in dealing with poor performance, and effective in providing suitable redress.

We need a system that is fair, and seen to be fair, to all those who use it. We need a system that is cost effective and efficient.

In the following chapters I set out proposals which aim to address all of these points. My proposals will deliver a streamlined and coherent regulatory system that is founded on principles and is risk-based. It will operate in the public interest and best uphold the rule of law.

My proposals also provide a more transparent and accountable regulatory framework, where that accountability is visible and responsibilities clear.

During the Review, I encountered a sense of anxiety in some that the legal services market in Scotland may be in decline. This included a sense of frustration that our legal jurisdiction should be better celebrated and promoted. There are some who believe that change is needed, strong leadership demonstrated and a shared vision for legal services in Scotland developed. I share that view.

I consider that the current regulatory system is not sufficiently able to support a forward-looking, dynamic and innovative legal services sector of the future. This includes understanding the role of technology in design and delivery of legal services.

Yet we have tremendous assets to support this:

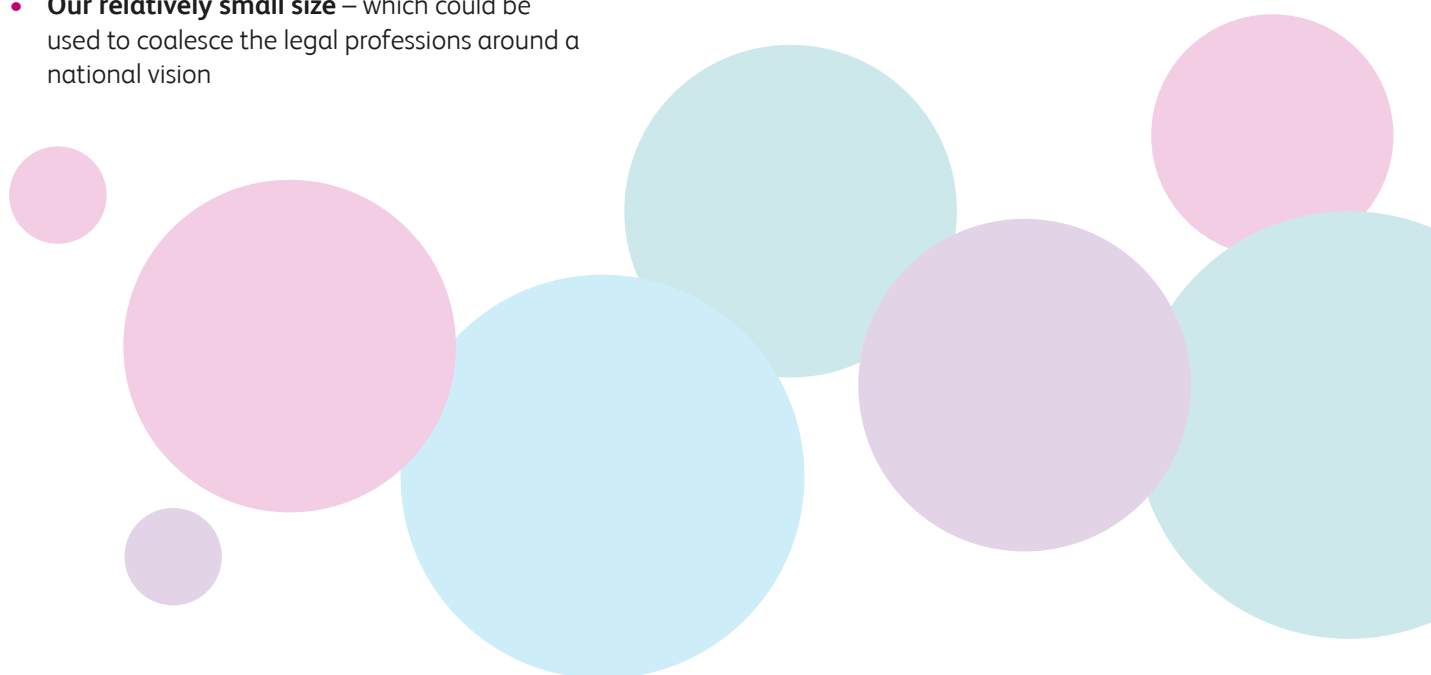
- **Our people** – the Scottish advocate and solicitor brands in particular and an enduring supply of highly skilled graduates
- **Our strong focus on access to justice** – including a vibrant and diverse ‘not for profit’ advice sector working hard for vulnerable people and a system of legal aid that has not seen significant cuts
- **Our relatively small size** – which could be used to coalesce the legal professions around a national vision

- **The economic debate in Scotland** – which is becoming more socially inclusive
- **Our courts and tribunals system** – which has been undergoing great change in the last ten years with the potential to go further in terms of access to justice

Jurisdictions across the world are grappling with regulation across all professions. This Review has therefore been timely as I have been able to draw on how thinking on regulation has been developing in recent years both domestically and internationally. There are similarities in the approaches that are being considered, across professions and jurisdictions. Change is happening with aims of delivering proportionate, risk-based, principled and independent regulatory systems, with varied degrees of ambition. None have so far taken the transformational approach that I propose, but many of them are moving in that direction. Scotland can be at the forefront of a new modern framework of regulation, leading the way for others.

Conclusion

The following chapters set out my recommendations for a new regulatory system that address all of the points raised above. It is ambitious. It is ground-breaking. It will be challenging in its development and delivery but it is achievable. I believe this will have a positive impact on consumers, providers and the Scottish economy and I urge the Scottish Government and legal professionals to support my proposals as a package.



Chapter 6

NEW REGULATORY MODEL / THE PROPOSED REGULATOR

This chapter outlines the structures and governance of the regulator along with its roles and functions

There is a huge opportunity to be grasped by building on the professional ethic that legal professionals display in their day to day work. My recommendations would create a system of regulation of which legal professionals could be truly proud and which will support service improvement, business growth in the legal sector and improve public confidence in legal professionals. This would further enhance the reputation and brand of the legal profession and help to ensure its future.

There is also an opportunity to place the regulation of legal services in Scotland at the forefront of international regulatory good practice, and improve the way in which consumer interests are visibly as well as practically protected.

Chapter 3 illustrated the cluttered landscape of players currently involved in the regulation of a relatively small number of legal services providers. During the course of the Review I considered an array of opinions and evidence on what a “good” regulatory system should look like. There was a consistent view, albeit not universally shared, that regulation should be independent of those who are being regulated. Most persuasive were the views of the Competition and Markets Authority as a consequence of its research, referenced earlier in this report, on the need to have a regulatory scheme that is independent of those who are being regulated and of Government.

The regulator

With this in mind my primary recommendation is that there should be a single regulator for all providers of legal services in Scotland. It should be independent of both government and those it regulates. It should be responsible for the whole system of regulation including entry, standards

and monitoring, complaints and redress. Regulation should cover individuals, entities and activities. That independent regulator should be a body accountable to the Scottish Parliament and subject to scrutiny by Audit Scotland.

In reaching this conclusion I considered models in operation in a number of professions including healthcare, teaching, accounting, architecture and the press during the lifetime of the Review. It is evident that models in other professions where there is a clear split between the roles of the regulator and the professional body or bodies deliver best practice in regulation. In terms of the medical profession, the General Medical Council is the main regulator with the Royal Colleges responsible for the promotion of members interests. The Architects Registration Board was established as the regulator for the architects’ profession with the Royal Incorporation of Architects in Scotland as their membership body.

This recommendation should not be taken to imply any criticism of the existing bodies currently involved in regulation. I firmly believe that those who use legal services, and those that deliver these services, will be best served in the future by independent regulation and redress that meets internationally recognised regulation principles and standards, putting the legal services sector in Scotland at the forefront of reform and innovation.

I believe that professional bodies providing both regulatory and representative functions can lead to the perception that the two roles are in conflict. It is this perception that risks compromising public trust. Encouraging and supporting open competition within that dual role is also challenging; regulatory bodies should be expected to encourage open competition, subject to maintaining standards, and that is a complex area for bodies which perform both representative and regulatory functions. Some senior solicitors I spoke to privately supported this view.

My further recommendations set out the way in which I think the new regulatory model for Scotland should operate.

The legislative approach

The current layers of legislation create a patchwork which is too detailed and does not allow for appropriate proportionality or flexibility to react to the wide range of scenarios which may arise.

Going forward we require an approach which avoids the pitfalls of the current legislative framework for regulation and complaints handling, which is detailed, prescriptive and does not provide for flexibility and agility. This has led to the current situation where the regulatory framework is disparate and dysfunctional. That is why I propose a regulatory system founded on better regulation principles and which takes a risk based approach. These proposals will allow the regulator to adapt to changes in the sector.

New legislation should set out the structure, functions, governance and appointments process for the new regulator. It should require the regulator to discharge its regulatory duties i.e. licensing duties, holding registers of professionals, developing monitoring arrangements and establishing a new fit for purpose complaints and redress system in terms of both individual and provider entities.

Any legislation should therefore avoid unnecessary detail including the activities to be regulated, the entities and individuals to be regulated and too much detail on the complaints procedures. There should be flexibility outside of statute for the regulator to respond to changes in the market, consumer and industry circumstances including new technology and new legal roles without the need for further primary legislation. This degree of flexibility can only be given to an independent regulator.

It will be for the regulator to apply the better regulation principles to its work taking a risk-based approach. The legislation should require the new regulator to develop a complaints handling process based on a wide range of available examples of good practice, including approaches where the process is less legalistic and provides for faster resolution for all parties. The money spent in Scotland, levied from providers to fund regulation of legal services should be recalibrated towards a culture of quality improvement and prevention and away from an expensive unwieldy complaints system.

The legislative approach should make clear the role of the Lord President and the courts in the regulatory framework.

Governance

New legislation should set out the structure, functions, governance and appointments process for the independent regulator. There are already many examples of independent organisations accountable to the Scottish Parliament. The recommendations around governance reflect well understood, tried and tested territory. However, I appreciate this may well be less familiar to those involved in the delivery of legal services. I do not intend for any of these recommendations affect to the independence of the legal sector in any way.

What my recommendations in this section seek to achieve is a model that delivers independent regulation within a context of accountability for the delivery of the key principle of public interest. The independent regulator should also have a degree of accountability to the profession it serves, and much of that will be delivered through statutory responsibilities to work with the profession. More of that follows later in this report.

In other professions there has been movement towards more lay members on Boards and lay chairs. The General Medical Council, the Nursing and Midwifery Council for Scotland, the General Teaching Council for Scotland, the Architects Registration Board and the Independent Press Standards Organisation all demonstrate a commitment to lay members on Boards albeit the proportions of lay and professional members differ across the bodies. Some have professional and some have lay chairs.

I recommend a non-legal Chair and an even balance of Board members between those with a legal background and those without as it will aid the independent regulator to have sufficient practitioner experience at Board level, even with the duties to engage closely with membership organisations. Non-legal members of the Board should not have any experience, current or past, of providing legal services.

- **There should be a new statutory framework to establish a single independent regulator which should set out the legal character and governance arrangements for the new body.**
- **The definition of legal services, the regulatory objectives and the principles should be set out in statute.**
- **The Board of the regulator should have a non-legal Chair and a non-legal majority to provide consumer and public confidence.**
- **The Scottish Parliamentary Corporate Body should appoint the non-legal Chair through a public appointments process. As is standard practice, having been appointed the Chair may only be removed by a two thirds majority of Parliament therefore preventing any undue influence from Government.**
- **The Chair should appoint an equal number of both professional and non-legal members of the Board by an independent public appointments process with an independent assessor external to the regulator.**
- **The Chair and Board members should be non-executives with experience of corporate governance who are appointed under public appointment best practice principles, with a maximum time on the board of 8 years.**
- **The Chief Executive of the regulator should be appointed by and accountable to the Board.**

Regulatory Model

The new regulatory model for the regulation of legal services should be principles based and deliver a risk based regulatory regime. It should embed the Better Regulation Principles set out in the *Regulatory Reform (Scotland) Act 2014*.

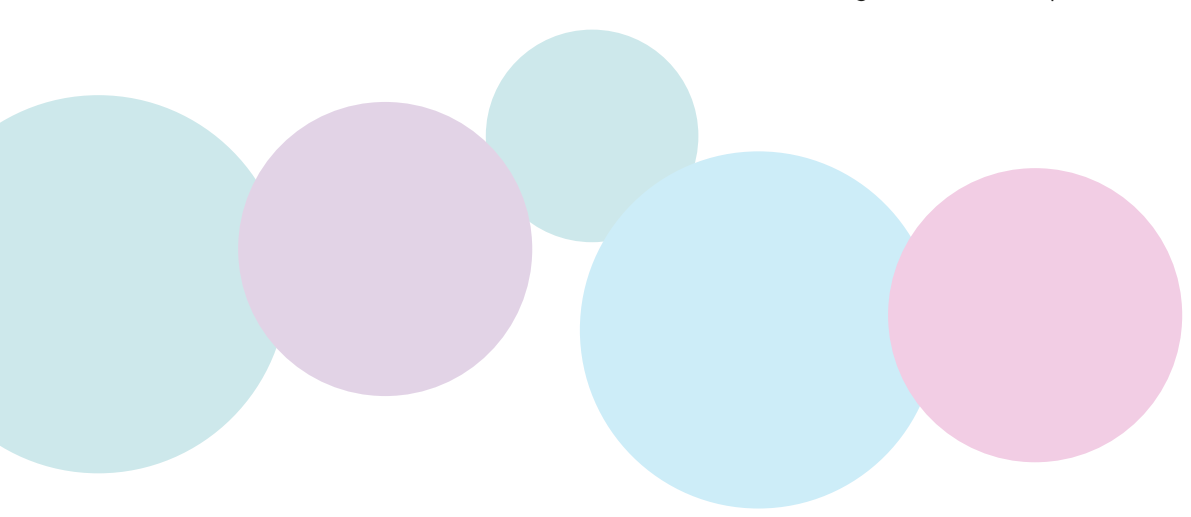
The new model should be designed around the delivery of these regulatory objectives:

- protecting and promoting the public interest including the interests of users of legal services
- supporting the constitutional principle of the rule of law
- promoting an independent legal profession and maintaining adherence to the professional principles
- improving access to justice including choice, accessibility, affordability and understanding of services by service users
- embedding a modern culture of prevention, quality assurance and compliance
- working collaboratively with consumer and legal professional bodies as appropriate
- embedding the better regulation principles throughout its areas of responsibility (and additionally “agility”)
- promoting innovation, diversity and competition in the provision of legal services

That framework should deliver the following outcomes for those served by the regulatory model:

- enable access to justice including choice and diversity
- uphold the rule of law and the proper administration of justice
- offer accountability in protecting the public interest
- secure the confidence and trust of the public
- enable future growth of the legal profession

These key functions will enable an independent regulator to maintain an oversight of the legal services sector, drive an improvement/preventative agenda, improve the consumer experience, deliver consistent quality assurance and provide a coherent and effective complaint and redress system. The independent regulator should be required to work proactively with the legal sector and membership organisations to improve standards and public trust.



Role and functions of the independent regulator

The regulator should regulate individuals including solicitors, solicitor advocates, advocates and commercial attorneys. It should also have the powers to regulate entities and should be empowered to seek to regulate providers of legal services in other jurisdictions.

The regulator should be responsible for the three stages of regulation:

Set standards, including:

- setting educational and entry qualifications
- maintaining a register of those who are fit to practice
- quality assuring continuing professional development

Code of conduct and ethics, including:

- setting out rules and guidance
- improving standards
- monitoring performance against standards

Complaints and redress, including:

- discipline, compensation
- ensuring any compensation is paid

In delivering these duties, the regulator should be required to work with membership organisations, consumer bodies and other relevant organisations to deliver its key functions.

- **The new regulator and the system should be financed by a levy on practitioners and entities. The cost of the new regulatory arrangements should be no greater than the current model and should ensure proportionality.**
- **The regulator should be required work in partnership with the legal profession, to ensure a sustainable and vibrant legal profession.**
- **The regulator should be required to ensure it embeds a consumer voice in the organisation.**
- **The regulator should be required to develop new systems, rules and processes in partnership with consumer bodies and those it regulates.**
- **The regulator should be required to lay an annual report before the Scottish Parliament including details on progress, performance and budgets and should be able to be called to account to answer questions in Parliament.**

Chapter 7

ENTRY, STANDARDS, MONITORING, COMPLAINTS AND REDRESS FOR INDIVIDUALS AND ENTITIES

This chapter discusses how the new regulatory system will operate across entry, standards, monitoring, complaints and redress in terms of individuals and entities. Entity and individual professional regulation should have parallel regulatory emphasis. The Scottish solicitor brand is hugely respected and that brand status should be protected. However, competition should be seen as a positive tool to drive up standards, satisfaction levels and to improve the sector's overall competitiveness and ability to support future jobs and that is why I propose that legal entities and legal activities be allowed in many different shapes and forms.

In the Scottish Parliament publication “*Training the next generation of lawyers: professional legal education in Scotland*” the introductory statement advises:

“On 26 June 2018, the Justice Committee held a round-table evidence session on professional legal education in Scotland. This evidence session focused on whether existing routes to qualifying as a solicitor in Scotland could be improved, in particular to remove barriers to entry to the profession for those from more disadvantaged backgrounds. A number of potential options were discussed, such as introducing apprenticeships or establishing a more integrated approach to legal education and training. While positive steps have been taken to widen access to legal education and training, the Committee’s round-table evidence session suggested that progress to date has been insufficient and there is a need for further action. The Committee therefore intends to return to this topic next year to review what progress has been made. It may also explore particular options for reform in more depth.”

My view is that a single independent regulator should be responsible for entry, standards, monitoring, complaints and redress and the wider roles of the

regulator around quality assurance, prevention and continuous improvement. I do not however, envisage that this should be a one size fits all model. Clearly the arrangements for each of the professional areas should be appropriate and proportionate to the business carried out by those professionals.

I recognise the differing views offered in the Call for Evidence responses to the Review as to where the regulatory powers should be vested in terms of prescribing qualifications routes. However, I consider that it is for the regulator to have an approval function on education, which should be developed collaboratively with the professional bodies and should consider and explore new routes into the profession which would increase diversity.

These proposals seek to simplify the current landscape by:

- providing the independent regulator with responsibility for oversight of education, standards and continuing professional development across all legal professional groups
- simplifying individual professional regulation
- introducing entity regulation support more innovative business models and delivery methods
- providing a much clearer line of sight from failure to meet standards to redress procedures for individuals and entities where standards and redress mechanisms are more transparent

This will require the regulator to hold a register for all legal professionals and put in place a system of licensing all legal professionals who practice whether or not they provide services directly to the public for example, in-house solicitors. It should establish criteria for acceptance on the register.

Continuing Professional Development

The professional bodies would also have a key role in developing and delivering continuous professional development. The role of the regulator will be to quality assure programmes whether delivered by professional bodies or others.

Advocates have a formal system of Quality Assessment in place where all practising advocates undergo assessments every 5 years to show they have maintained the skills which were needed to gain entry to the Faculty. Anyone failing to meet set standards has to undertake training and pass another assessment before being allowed to continue in practice. There is also a mechanism for external (peer) assessment of the Quality Assessment scheme. I do not suggest that this process should change, only that the independent regulator should quality assure the scheme.

Standards and monitoring

The Law Society of Scotland operates:

- the code of conduct and service for individual professionals (practice rules including accounts rules which run to 289 pages) (approved by the Lord President)
- guidance which is not mandatory to follow but non-observance could be used in a disciplinary case

Other professions such as the Institute of Chartered Accountants of Scotland have significantly shortened their rules in recent years. The Solicitors Regulation Authority has updated the rules for solicitors' regulation from 650 pages down to 6-7 pages of core values and conduct standards for solicitors. They propose two separate codes of conduct, one for firms and one for solicitors. In their view, this will reduce the overall cost of regulatory compliance on firms and individuals in the longer term. In *Looking to the Future: Flexibility and public protection – a Phased Review of our Regulatory Approach* (November 2015). The Solicitors Regulation Authority adopt an outcomes based approach to recognise that firms vary in their form, services and clients as well as practices.

I propose that the independent regulator should have responsibility for setting standards and in doing so should drive a preventative/Quality Improvement focus, including simplification and better overall cohesiveness of the rules making them more consumer friendly, comparable and proportionate.

- **The regulator will hold a register of those it regulates, any lawyer, solicitor, solicitor advocate, advocate, or commercial attorney who wishes to provide legal services must be admitted to the register.**

- **The regulator should have oversight of education and training and work in partnership with all of the legal professional bodies to keep these areas under review.**
- **The regulator should quality assure the membership bodies in accrediting Continuous Professional Development schemes.**
- **The regulator should work with the professional bodies (The Faculty of Advocates, The Law Society of Scotland and The Association of Commercial Attorneys) to simplify existing codes of conduct and service standards including making them more consumer friendly, comparable and proportionate..**

Solicitors' title

The Law Society of Scotland in its *Revised Case for Change (2018)* states, "The term 'solicitor' is a protected title in Scotland and the rest of the UK. It is a criminal offence for any person to pretend, wilfully and falsely, to be a solicitor. There are, however, no such restrictions around the use of the term 'lawyer'. As a result, any person, regardless of qualification, experience or regulation, can legitimately refer to themselves as a 'lawyer'".

Only a person who has a practicing certificate from the Law Society of Scotland who provides services as a solicitor is covered by protections such as professional indemnity, the oversight of the regulator and the Scottish Legal Complaints Commission. The practicing certificate provides assurance about knowledge, qualifications and authorisation.

Individuals can currently call themselves a lawyer without a practicing certificate, so these services would not come with the same protections.

The consumer often does not appreciate that there is a significant difference between a solicitor and a lawyer – all solicitors are lawyers, but not all lawyers are solicitors.

Both the consumer groups and the Law Society of Scotland believe that both titles should be protected, I support that view.

The title "lawyer" should be a protected title in the same way as "solicitor" and only those who are regulated should be permitted to use either title.

Although I have received representations that the title of “advocate” should be protected, I make no other recommendations around protecting any of the other current legal professional titles in Scotland such as “advocate” or “counsel” for example. These titles are already in common use in other spheres such as mental health, likewise there is no evidence of public confusion.

Master Policy

All solicitors working in private practice are required to have professional indemnity insurance in place, through the Law Society of Scotland’s Master Policy. This is the professional indemnity insurance that covers any valid claim against a solicitor for an act of negligence which has occurred in the course of that solicitor’s work, even if the solicitor is no longer in practice.

The Law Society of Scotland makes arrangements each year for the Master Policy. However, individual claims are handled by the Master Policy insurers and not the Society. Each practice is obliged to contribute to the premium in order to be covered and the premiums are determined by the lead insurer’s rates and rating factor rules. While the Law Society makes the arrangements, the Master Policy is a commercial insurance arrangement. The Scottish Legal Complaints Commission has a statutory role to oversee the operation of the Master Policy.

There is no reason to shift from the status quo where annual arrangements to set in place the Master Policy is a role for a membership organisation, therefore I do not propose that the current arrangements should be changed. The oversight role should, however, be transferred from the Scottish Legal Complaints Commission to the regulator.

The regulator should require all professionals on its register providing legal services to the public to have appropriate indemnity insurance.

Client Protection Fund

Now known as the Client Protection Fund, the Scottish Solicitors’ Guarantee Fund is a statutory fund to “make grants in order to compensate persons who suffer a pecuniary loss by reason of dishonesty” on the part of a solicitor, an employee of a solicitor, a registered foreign lawyer or a conveyancing/executory partner or employee.

The Fund provides awards to clients who suffer a loss through the hands of an unregulated legal services

provider or others who are not bound to contribute to the Fund, and will also do so if the solicitor concerned has since died, been struck off or suspended. It is a discretionary fund underpinned by rules and criteria. It is currently operated by the Law Society of Scotland’s Regulatory Committee and is overseen by the Scottish Legal Complaints Commission.

I consider the future operation of this Fund would best be delivered by the new independent regulator.

ENTITY REGULATION

In this section I will set out the benefits of entity regulation and discuss issues of ownership and shareholding. Importantly, it will be for legal professionals and others to decide whether they wish to structure their businesses in any of the ways that will be permitted.

As referred to in the landscape chapter the current system of regulation of legal services in Scotland, as in other professions, emphasises regulation of the individual professional, however some entity regulation as well as some activity regulation is sometimes present, it is a confused and complex landscape, hard for those inside and outside the sector to understand.

For example third sector organisations such as Law Centres require to set up a traditional legal practice if they wish to employ solicitors, they are then regulated by the Law Society of Scotland.

In Scotland, progress towards establishing an Alternative Business Structure regulator or regulators is being made. The current statute includes a mandatory 51% ownership rule for solicitors or named regulated professionals to own most of the business with no external investor ownership. In England and Wales, up to 100% non-lawyer ownership is allowed in Alternative Business Structures, although at least one of the managers must be a regulated lawyer. The 51% rule does not fully enable Scottish firms to compete with non-domestic competitors and puts them at a disadvantage with regard to sourcing capital. The rule also prevents employee or community ownership schemes.

New UK Anti Money Laundering requirements have already introduced aspects of entity regulation across all Scottish legal practices as Anti Money Laundering regulators have to develop risk profiles of firms.

The Scottish Legal Complaints Commission and the Law Society of Scotland have both expressed support for some form of entity regulation.

Benefits of entity regulation

Entity regulation has great potential to deal with a number of issues such as:

- access to investment
- increased internationalisation of legal services including cross-border firms
- more sophisticated consumer demand including for online services
- more risk-based profiling

And to improve:

- quality standards
- management, supervision and quality improvement systems
- complaints systems

Entity regulation would afford better protections for consumers who contract with the entity, not the individual professional (particularly if a legal professional who is the subject of a complaint cannot be identified).

The *Scottish Consumer Council and the Office of Fair Trading (2007)* in their response to the Which? Super Complaint, reiterated the findings of the *Research Working Group on the Legal Services Market in Scotland in May 2006* which identified a number of restrictions on competition in the Scottish legal services market. It noted that there were restrictions against:

- solicitors and advocates providing services jointly ('legal disciplinary partnerships')
- partnerships between solicitors and other professionals, such as surveyors, accountants or IT professionals ('multi-disciplinary practices')
- solicitors employed by non-legal firms to give advice direct to the public (commonly referred to as 'Tesco law')
- partnerships between advocates
- direct access by members of the public to advocates, without having to go through a solicitor

This led to the Legal Services (Scotland) Act 2010.

Enabling Framework

I propose an enabling framework where entities could involve a combination of legal- professionals only (different groups), legal-professionals (from one or more group) with other regulated professionals e.g. accountants, estate agents, or any of those groups together with unregulated professionals such as will writers or mediators. Legal professionals in an entity with multiple professionals should be regulated by the legal regulator. Other professionals working in the entity would be regulated by the appropriate professional regulator.

It should be left to the regulator to establish a flexible licencing scheme.

The main arguments in support of entities including so called "multi-disciplinary practices", are as follows:

- one stop shops offering a holistic package of services, providing greater choice and competitive pricing e.g. estate agency, architects, surveyors, accountants and solicitors working in one entity
- remove the need for firms to create potentially cumbersome or unsound "work-around" and reduce overheads involved in doing so, and allow non-solicitors to profit share
- increase protections around both regulated and unregulated professionals
- introduce a more modern system of compliance, reporting and responsibility at firm level especially on financial compliance and on consumers (complaints)
- more innovative services (Enterprise Research Centre, 2015: Innovation in legal services: A report for the Solicitors Regulation Authority and Legal Services Board)
- new business models with the potential to offer affordable services to consumers and increased longer term sustainability in the legal services part of the business
- free online forum or e.g. subscription services could translate initial demand for more straightforward transactions into repeat business for more complex services from solicitors

Other groups such as Will writers could choose to submit to regulation, although they are not solicitors or lawyers.

Opportunities for legal technology in Scotland

In Scotland with its dispersed rural population groups (as well as a concentration of the population in cities) and a wider societal shift towards people seeking services online there is significant potential for online legal services which currently remains significantly underdeveloped. A submission by Julario, legal tech company, to the Call for Evidence suggests that Government backed free content services may be the first logical steps to building the market. The Scottish Government's CivTech challenge provides online content which navigates users to the right sources of legal help to suit their problems and circumstances. Subscription services providing templates and signposting to qualified solicitors where necessary are entering the market where new forms of entities are permitted and would be able to do so under my proposals for entity regulation.

Legal tech in its different forms has significant potential to provide a range of services from corporate legal services to services increasing access to justice. The danger for policy makers is to over specify activities or professionals in legislation without leaving enough flexibility for new activities and this should be guarded against. Regulation should not to put up artificial barriers to new services.

Entities and Standards – Licensing the Entities

Licences for entities should be issued by the regulator subject to a “fitness to be an entity” test that the regulator should determine including protections such as insurance – the Solicitors Regulation Authority application process for entities (authorised providers) may offer an example. The regulator should have the power to revise the licensing test. Any new emerging types of entities will not be able to provide legal services until licensed.

On balance, I believe the regulatory framework should allow for external capital and investment to come into legal firms and therefore provide opportunities to both grow and future proof those businesses. There need not be a controlling share of management or ownership by legal professionals in entities. Managers and owners could be different. Owners would be required to pass a fitness to own test.

The Clementi Review (2004) noted that a fitness to own test should have regard to

- a) honesty, integrity and reputation,
- b) competence and capability and
- c) financial soundness

In acting upon the recommendations for entity regulation, the regulator should ensure proportionality for different sizes of entities and third sector entities. Solicitors in public bodies and in-house solicitors would be regulated as professional individuals.

Entities and monitoring

In England and Wales, the Solicitors Regulation Authority triangulates a number of different pieces of data about entities including audits, self-reporting data, and whistleblowing.

In New South Wales, Australia, incorporated practices must have a legal practice director who holds a practicing certificate and is responsible for ensuring compliance and maintaining high ethical legal professional standards. English Alternative Business Structures must have a Compliance Officer for Legal Practice and a Compliance Officer for Finance and Administration and this has now been extended to all firms.

In New South Wales a system of self-assessment helped firms, especially small firms, address areas of poor performance that could have led to more serious problems if not identified and was welcomed by the firms. I believe that the Scottish system of regulation should move to a proactive-based management system which helps the entity to monitor compliance with principles and rules, as has been introduced in New South Wales. The principles in the proactive-based management system should be for the regulator to identify.

- **The regulator should license all entities providing legal services to the public and corporate entities, subject to a “fitness to be an entity” test that the regulator should determine including protections such as professional indemnity insurance. All legal professionals licensed through the regulator would also have to be licensed through an entity. This would not include Advocates and in house professionals.**

- The model for entity regulation should be enabling, flexible and should apply to any organisation which employs at least one legal professional.
- The regulator should introduce proportionate arrangements including fees for licensing different types of entities and including not for profit organisations.
- The Scottish Government and the regulator should review the standards and accreditation process for Scottish National Standards for Information and Advice Providers in order to establish if those providers covered by these standards should be regulated and ensure that regulation is proportionate.
- The regulator should require to ensure that all licensed entities have a legal compliance director who is a regulated legal professional and a director of finance and compliance. They may have to be the same person where it is unavoidable e.g. sole traders. Those responsible for financial compliance need not be legal professionals.
- The regulator should take on the role of Anti-Money Laundering regulator in Scotland as well as the role of incidental financial business regime under financial services legislation.
- The regulator should work with the Scottish Government to consider how data should best be shared to ensure consumers are protected from harm and enable the regulator to adopt a risk based approach to intervene where systemic issues are identified. The regulator should work with the professional bodies to establish a process to assist those professionals identified by this process to improve their standards.

Claims management companies

Currently Claims management companies are not regulated. I have noted that the UK's *Financial Guidance and Claims Act 2018* will allow the Financial Conduct Authority to regulate Claims Management Companies in Scotland once the legislation is enacted and implemented.

The regulator should review whether the Financial Conduct Authority regulation of Claims Management Companies in Scotland is working or whether there are gaps or discrepancies around Scottish circumstances that need to be more carefully considered.

Activities

Activity regulation tends to proliferate the number of regulators and also can lead to inflexibility and a lack of agility. On the other hand it offers the chance to introduce more risk-based profiling. If there is effective individual and entity regulation in place, activity regulation will largely be captured by these groups.

The issue of which activities legal professionals can exclusively provide is interlinked with the definition of legal services.

The main statutory definition for those legal services reserved to solicitors at Section 32 of the *Solicitors (Scotland) Act 1980* provides that:

“...any unqualified person (including a body corporate) who draws or prepares—
 (a) any writ relating to heritable or moveable estate; or
 (b) any writ relating to any [action or proceedings in any court] ; or
 (c) any papers on which to found or oppose an application for a grant of confirmation in favour of executors,
 shall be guilty of an offence...”

The Law Society of Scotland have noted that where a firm is regulated by the Law Society, they are regulated to the extent of all legal services, whether or not the service provided is reserved under section 32 of the 1980 Act.

I do not accept the argument put forward in the Law Society of Scotland's *Case for Change* that additional legal areas should be reserved to solicitors. Currently, regardless of the area of civil law, section 32 means that solicitors are still required to deal with most aspects of court proceedings so solicitors could be said to have many exclusive rights to litigation (in the lower courts where advocates and solicitor advocates mainly appear in the higher courts). I do not see the case for extending this.

Many will writers who are not solicitors operating currently in Scotland are members of either the Society of Will Writers or the Institute of Professional Will Writers. The Society of Will Writers provides voluntary regulatory services such as continuing professional development and professional indemnity insurance as well as information on standards and deal with complaints. The question for

the Review is whether the new regulator should take on these duties on a statutory/voluntary/accredited basis with the regulator working in partnership with the Society of Will Writers. I believe that, in this instance Will Writers should have the option on a voluntary basis to be subject to regulation.

There should be no substantial change at this stage to bring more activities within the scope of those activities “reserved” to solicitors or to remove activities i.e. will writing should not be reserved. Entities licensed by the regulator should be able to undertake confirmation as an activity.

It should be for the regulator to propose to the Scottish Government which activities to reserve to legal professionals in the future and which should be regulated.

The new regulator should work with the Office of the Immigration Services Commissioner to ensure that individual legal professional immigration practitioners i.e. solicitors and non-legal professional immigration practitioners codes of conduct align. Complaints on legal professionals and non-legal professionals would sit with the appropriate regulator. Best practice sharing between the bodies should take place.

COMPLAINTS AND REDRESS

The one area where I found very clear unanimity was on the subject of the complaints and redress process. At every stakeholder event and in the responses to the Call for Evidence, the strongly held view was that the current complaints system is not fit for purpose.

The Scottish Legal Complaints Commission was created in 2008 to provide an independent gateway for all complaints about solicitors, advocates and commercial attorneys. Its creation was itself a response to criticism that the complaints system was not consumer friendly enough, resulting from *The Scottish Parliament’s Justice 1 Committee’s Report in 2002 on Regulation of the Legal Profession Inquiry*.

Too much detail in legislation on the processes that the Scottish Legal Complaints Commission is required to follow has limited the ability of the Commission to respond to a complaint proportionally. The legislation also restricts the opportunity to make any significant improvement to the process.

A lack of clarity on handling hybrid complaints led to a court case to determine the interpretation of the law. From a consumer perspective, a complaint is a complaint and may have elements of both service and conduct. I believe it is therefore unhelpful to have to make that distinction early in the process. In many jurisdictions, the complaint is subject to a single investigation and any conduct concerns are directed through the relevant process and, if necessary, investigated in parallel.

Views from the Call for Evidence and stakeholder engagement

Responses to the Call for Evidence laid out in Chapter Four serve to further amplify the issues raised in relation to the complaints system. Responses varied from saying that the complaints and redress system is not working as it should to that it is irrevocably broken.

The Scottish Legal Complaints Commission’s mediation service received praise from different stakeholders including legal professionals as serving both parties in a complaint well. The overall view though is that the current complaints system is too complicated and unwieldy. There are too many duplicated layers of investigation and the whole process takes too long. The longest complaint I was made aware of took 6 years.

There was agreement amongst stakeholders that there is an urgent need for clarity and reform. The responses reflect a feeling of a lack of transparency, for some consumers a lack of power and a lack of trust and accountability of those bodies involved in dealing with complaints.

The Way Forward

First tier complaints handling

My recommendations for a regulator taking a quality improvement approach would encourage providers to see complaints as an opportunity to learn and improve. This would mean requiring providers to have adequate processes in place for handling complaints at first tier. Only in the event that the complainant is unhappy with the outcome of that process, should they be able to lodge a further complaint with the regulator.

I support the Scottish Legal Complaints Commission recommendation:

“We believe the solution is to plot a route from A to B, based on the experience of the consumers and lawyers (in all their diversity) who have to go through this process. The whole process could be reduced to three core stages:

1. A single investigation – ensuring there are a range of flexible options to filter out vexatious and similar complaints and allowing processes proportionate to different levels (£200 or £20,000).
2. Determination – by the same organisation in relation to lower level issues, or by prosecution at the professional tribunal for conduct which may lead to removal from the profession
3. Appeal – to ensure accountability and meet the requirements of natural justice there should be a single opportunity to appeal at the conclusion of the process“

**SCOTTISH LEGAL COMPLAINTS COMMISSION,
#REIMAGINEREGULATION**

In England and Wales, the Legal Standards Board requires firms to provide a full response within eight weeks. Once that process is complete, the complainant can take the complaint to the Legal Ombudsman. The firm against whom the complaint is lodged is liable for a fee at time of writing of £400. This can be waived if the firm can evidence that

- they followed an appropriate first tier complaints handling process and
- they advised the complainant of the right to take the complaint to the Ombudsman

This regime of “carrot” rather than “stick” seems wholly compatible with a quality improvement approach.

The complaints system should also allow the regulator to adopt a risk based approach to intervene where systemic issues are identified and where there has been a failure to meet those standards. The aspiration would be for a measurable reduction in complaints over time. New South Wales introduced a system of self-assessment whereby the senior members of a legal provider were required to consider their own customer service and complaints handling process, as a result complaints fell by two thirds.

A single regulator for all legal services that takes a risk-based approach to targeting regulatory interventions fits well with the obvious desire amongst stakeholders from every quarter in Scotland to simplify the complaints process.

The legislation should require the regulator to develop a complaints handling process for those it regulates. This process should be based on well-established consumer principles and provide appropriate and speedy resolution for all parties. This should include the option of early dispute resolution learning from the Scottish Legal Complaints Commission’s positive experience of mediation services.

I believe it is both critical and urgent to establish a new, more streamlined and user friendly complaints process if public confidence is to be restored.

I believe that given the urgent need to reduce complexity in the complaints process, we should retain the single gateway but that there should be a move to a single investigation of a complaint. This will be easier to implement with the creation of a single regulator.

There should be a single gateway for complaints and a single investigation, where conduct concerns can be directed at any stage through a separate process and on to an single disciplinary tribunal where appropriate.

Conduct elements should not be held up behind investigations of service

Where harm has been done the regulator should have flexible and proportionate sanctions available to it and a transparent process to ensure that sanctions are fair.

Those who are innocent of wrongdoing should be cleared faster than currently.

Disciplinary Tribunal

The Law Society and Faculty currently both have a disciplinary tribunal.

There is a perception that the processes of the Scottish Solicitors' Discipline Tribunal are unnecessarily complex and take too long to conclude matters, causing significant stress to the solicitors concerned. There is also a perception that the process lacks transparency and contains inbuilt bias, points which the Scottish Solicitors' Discipline Tribunal acknowledges in its response to the Call for Evidence.

I believe that the regulator should establish a single tribunal which decides on conduct breaches for all legal professionals providing legal services.

Valuable lessons could be learned from other examples including the General Medical Council and the Medical Practitioners Disciplinary Tribunal.

Appeals from decisions

The appeals part of the complaints system is unwieldy and unworkable. I believe that this is a result of the elaborate complaints architecture, strictures on processes and the number of bodies involved in handling individual cases. In 2017 appeal legal costs for the Scottish Legal Complaints Commission were £166,000 compared to £30,000 for the Legal Ombudsman in England and Wales. Overall between 2007 & 2017 the Scottish Legal Complaints Commission spent £1.4 million on legal appeal costs.

“The Scottish Legal Complaints Commission’s decisions at each stage of the preliminary process may be appealed to the Court of Session. The same is true of the Scottish Legal Complaints Commission’s decisions in respect of categorisation of complaints as either service complaints or conduct complaints, and of the Scottish Legal Complaints Commission’s determinations of the merits of service complaints.”

**LAW SOCIETY OF SCOTLAND – CASE FOR CHANGE:
REVISITED 2018**

Currently appeals against decisions of the Scottish Solicitors' Discipline Tribunal or the Scottish Legal Complaints Commission can go to the Court of Session. Many consultation responses have commented that such appeals are beyond the reach of ordinary people. Complaints about the professional bodies handling of complaints can go to Judicial Review. I understand that the 2010 Act originally specified that there should be no appeals from decisions of the Scottish Legal Complaints Commission.

The appeals processes are created in the image of court business with layers of appeal. Some of the architecture may have been put in place with an eye to ensuring Article 6 compliance, Article 6 of the European Convention on Human Rights is a provision of the European Convention which protects the right to a fair trial, i.e. if it is at all in doubt that the forum where the initial decision was taken is independent or not, having a right of appeal to a higher forum is desirable to ensure compliance. This issue would be addressed within the structure of an independent regulator. I refer to decisions of for example the Scottish Public Services Ombudsman and Legal Ombudsman in England and Wales which are final, although may be subject to Judicial Review.

The regulator should be required to develop a simple process of appeals which are only available at the end of the complaints process

Redress and compensation

Consumer bodies such as Citizens Advice Scotland have argued that the compensation arrangements do not currently make any sense. It seems inappropriate that consumers can receive a higher award for a service complaint than they can on a conduct complaint.

I also learned that even when compensation is awarded, there is no power to ensure that it is paid, particularly if the firm has gone out of business.

The regulator should be required to develop a menu of redress options for complainants and this should include compensation. The regulator should have the power to enforce compensation awards.

The Scottish Legal Complaints Commission says that it should be easier for clients to win compensation from the **Client Protection Fund**. The Law Society of Scotland has also asked for changes making it easier to administer the fund. The regulator should be responsible for the Client Protection Fund.

Whistleblowing

There is currently no recognised system of whistleblowing within the profession. The Law Society of Scotland Rules, Waivers and Guidance Sub-committee have consulted the membership in 2017 but no decision has been agreed upon as to the way forward.

I was surprised to learn that unlike in the NHS, legal professionals currently have no duty to report concerns about failings in professional service or conduct. I believe that a positive obligation to whistle blow would enhance the quality and reputation of the legal profession .

The regulator should be required to develop a formal whistleblowing procedure.

Conclusion

I believe my recommendations would result in a complaints system which would regain consumer trust in that legal profession and ensure the legal profession in Scotland continues to be regarded as one of the best in the world.



Chapter 8

IMPLICATIONS FOR THE ORGANISATIONS IN THE EXISTING REGULATORY FRAMEWORK

I realise that these proposals have significant implications for the organisations involved in the current regulatory structure, in particular the Scottish Legal Complaints Commission, the Law Society of Scotland, the Faculty of Advocates and the Association of Commercial Attorneys. Creating a single independent regulator with responsibility for all regulatory functions decouples the regulatory functions from the representative functions. The legislative journey towards the establishment of the new regulator will take some time and should provide the opportunity for appropriate planning and preparations for the transition.

The most significant impact will be for the Scottish Legal Complaints Commission as the organisation as currently constituted would be wound up and the responsibilities transferred to the new body.

The membership organisations will still have a significant role to play in regulation as the regulator will be required to work closely with them for

example, to co-produce standards and codes of conduct. In the case of the Law Society of Scotland and the Faculty of Advocates much of the regulatory work is supported by the contribution of members in a voluntary capacity and I would hope and expect that this would continue in the interests of the profession.

Meanwhile, there will be a continuing and growing need for the membership bodies to support and promote the profession at home and internationally, to provide services including education and continuing professional development, and to work together to deliver a sustainable and ambitious future for the sector. There will also continue to be a need for the important work that they do in developing proposals for law reform.

I believe that working together to support the establishment of a new independent regulator will be a statement of the self-confidence in the quality and integrity of the profession. I also strongly believe that the organisations involved will be able to make the transition and continue to play a crucial role in the development of a vibrant and well respected legal services sector.

Chapter 9

COST OF NEW REGULATORY ARRANGEMENTS

Overall current cost of regulation of legal professionals in Scotland

There is no comprehensive information publicly available on the total cost of the current system to providers.

The Law Society of Scotland in its annual accounts attributes £2.7 million to the direct cost of regulation in 2017 (*Law Society of Scotland, Financial Statements for the year ended 31 October 2017*), this accounted for 24% of the Group's expenditure.

It is difficult to estimate the overall cost of regulation for all legal professionals in Scotland as the different bodies with roles in the system have different accounting years and publish that information at different times. The Review was also unable to access information from every professional body:

- the total expenditure for the Scottish Legal Complaints Commission in 2017-2018 was £3.2 million
- the Law Society of Scotland budget for regulation is estimated to be in excess of £3 million after allocating a proportion of overheads
- the Scottish Solicitors' Discipline Tribunal in its 2016-17 annual report (the latest published) states that the total cost including lay members was £220,257 (solicitor members are unpaid). It was unclear if some of this figure is already included in the law society's regulatory costs.
- no figures were able to be sourced from the Faculty of Advocates regarding the cost of regulation or the Disciplinary Tribunal, but the cost is judged to be minimal
- no figures were sourced for regulatory costs on the Association of Commercial Attorneys although these are also expected to be minimal

Therefore, based on the publicly available information the cost of the current regulatory system looks to be around **£7 million per annum**, although we acknowledge the limitations of the information we have been able to process.

This reflects the complexity and cluttered landscape of regulation and complaints handling.

Too much of the Scottish budget for regulation of legal services is given over to complaints. For example, the Scottish Legal Complaints Commission (*budget reports*) have spent £1.382 million between 2009 and 2017 on appeals which is very high given the small constituency covered by the complaints system of around 12,000 professionals. To put this into perspective in 2017 alone the Scottish Legal Complaints Commission spent £166,000 on appeals. The equivalent figure in England and Wales was £30,000 to cover 200,000 legal professionals.

I was interested to note the costs of the *Architects Registration Board (2017, facts & figures: finance)*, responsible for regulating around 40,000 architects in UK, which has a total budget of around £4.5 million.

Approach to licensing fees by the new regulator

I am clear that the global cost of the new regulatory system should not be more than the cost of the current system.

As already discussed the body would have to lay an annual report and budget in Parliament and be subject to scrutiny by Audit Scotland. This is to ensure an additional accountability mechanism and to provide assurance that efficient, effective and proportionate regulatory arrangements are in place.

The cost of the new regulatory arrangements should be fair to those paying the licensing fees. Small firms make up a large proportion of the Scottish legal services market so a disproportionate burden should not fall on them. Third sector advice providers should also face reasonable and proportionate charges where licenced as an entity.

There should be no funding relationship between Scottish Government and the new regulator. The system should be financed by a levy on practitioners as is the current arrangement, and also on entities under the proposed model. However the Scottish Government should make funding available for the start-up costs of the new regulator. It would

be for the regulator to decide how to set the levy in consultation with the profession and providers. The regulator would be accountable to the Scottish Parliament.

Individuals and entities providing legal services to the public will be required to be licenced by the regulator, this will provide the regulator with a dual source of income. I suggest that the regulator will require to balance its costs carefully across individual professional regulation and parallel entity regulation. In particular, better regulation does not mean disproportionately heavy regulation but right-touch regulation.



Chapter 10

ECONOMIC CONTRIBUTION OF LEGAL SERVICES

When I first took on the Review, it was not immediately obvious why regulation should have any significant implications for the economy. I soon realised that the current complex regulatory framework was a serious constraint on growth, investment and innovation.

The Legal Services (Scotland) Act 2010 had been intended to free up the scope for new business models but, eight years on, for a variety of reasons at time of writing has still to be implemented. Many firms have found ways to work around the constraints and the Law Society described the legislation as “unwieldy and unworkable”.

The proposed changes were themselves still fairly prescriptive and restrictive in terms of new models and bore little relationship to any assessment of risk. In England and Wales, new models have been permitted for several years and development has been incremental – to quote Sir David Clementi, there had been “evolution not revolution”.

I believe that my proposals for an independent regulator should allow business models to develop over time and should not require to be specified in legislation. My proposals for a risk based approach to entity regulation should ensure there is adequate consumer protection.

As mentioned earlier in the report, there is little hard evidence about the contribution the sector makes to the economy aside from *TheCityUK report 2016*. Scottish Enterprise sees professional services as enablers of growth rather than as contributors and therefore does not treat them as a priority sector. In contrast, the *Scottish Government’s Economic Strategy, March 2015*, identifies Financial and Professional Services as one of the six priority sectors for growth. There seems, however, to be a perception that the focus is on the financial sector and that legal services are the “Cinderella” of professional services. Part of the reason for this may be that there is no single body responsible for promoting the sector equivalent to Scottish Financial Enterprise.

Meanwhile, since the 2008 financial crisis, there has been significant change in the sector with many

Scottish owned and headquartered firms merging with or being taken over by large UK firms as well as other firms which have folded completely. There has been a significant reduction in crime which has had an impact on demand for services in criminal law and anecdotal evidence that there has been at least a 40% reduction in civil actions. The latter may be because of effective early dispute resolution – which would be a good thing – or in these times of austerity, because people are reluctant to pursue civil actions for fear of the cost.

I had, perhaps foolishly, assumed that in the commercial sector Scottish lawyers and advocates would have significant business in the oil and gas sector for example but quickly learned that this work tends to go to London as contracts are invariably drawn up under English law.

As previously highlighted, I encountered a sense of frustration by some that the legal services sector may be in decline. This included a sense that our legal jurisdiction may be losing its uniqueness. There are some who believe that we need to change and we need to do it now to stem the decline and take advantage of new opportunities this would include for example bringing new players and capital into the market who could revive the sector and provide high quality legal jobs for the future, including legal tech players.

Throughout my engagement with the sector I found pockets of ambition and enthusiasm to grow the sector but also found a sense of resignation in some areas that Scotland would continue to struggle to compete in the increasingly global market.

Another key issue where I found little evidence of a strategic approach was in the area of digital development. There is already significant progress in this field south of the border as well as internationally and in my view the sector in Scotland has yet to waken up to both the threats and the opportunities which this digital disruption presents. There seems to be a lack of joined-up thinking, vision or investment.

ScotlandIS is Scotland’s trade body for the digital technologies industry. They represent and support businesses and organisations creating & delivering digital products and services. The CEO, Polly Purvis,

believes that there is scope for a LegalTech equivalent to Fintech Scotland, the body which provides funding, support and infrastructure to help secure Scotland's place as significant player in the global FinTech movement. She, along with others, believes that Scotland could be leading the way in developing digital services both for providers and directly to consumers, for example using blockchain in property law.

A final frustration is that the sector is fragmented, with no single body pulling together the various players from the lawyers, the advocates and the courts system. The responses from the Call for Evidence publicly reignited a long-standing dispute between the Faculty of Advocates and the Society of Solicitor Advocates. Whilst I understand that there are strong views on both sides, I would hope that this dispute can be resolved and that the two branches of the profession can work together with others to secure a larger share of the market.

It is not for this Review to determine the future structure and business models of the profession but I think it is worth noting Professor Ken Mackinnon of Robert Gordon University's comment in his response to the Call for Evidence:

"Overseas jurisdictions with a common law background demonstrate clearly that there is no need for a divided profession....The emergence of solicitor advocates over the past decade has resulted in a blurring between the two branches ...It is therefore difficult to see a justification for (A) having two distinct branches and (B) regulating them differently."

My proposals will bring the regulation of both branches under the same organisation. I believe that the legislation should remain silent on the business models and allow any changes to be evolutionary and not require primary legislation. In England and Wales for example barristers may now work in multi-disciplinary partnerships.

At one of my early meetings in the Review someone used the expression "jurisdiction of choice". My recollection is that this was the term used by the USA state of Delaware as part of their campaign to grow their legal services sector. I believe we should be taking a similar approach and investigating potential areas of specialism for Scotland.

In the final stages of evidence gathering I learned of a report published in November 2008 by a group established by Scottish Government called

the *Business Experts and Law Forum*. This report articulates many of my own conclusions about the state of the legal services sector in Scotland and its potential for growth. One view from some of the group's members is that implementation of the recommendations was dependent on courts reform. This is now either complete or well in hand. I believe that this report is well worth revisiting given how many of its findings are still valid today.

I have said elsewhere that I am ambitious for Scotland and for our legal services sector. I believe that ten years on from the report by the Business Experts and Law Forum there is still an opportunity for Scotland to secure a bigger share of the global market for legal services. It would only require us to secure a very small slice of that global 'cake' to have a significant impact on our economy.

We have significant strengths in terms of the reputation of our legal brand and the brand of Scottish lawyer. Our scale can be an advantage as it means that the sector is small enough to be agile. We have also demonstrated our ability to be **entrepreneurial** in the digital sphere in other sectors.

In meetings with some of the global leaders in legaltech, I have often heard surprise and frustration that Scotland has not taken advantage of these strengths to become a global hub in this field.

A new initiative was launched earlier in the year by Scottish Government, Scottish Development International and the Law Society to promote Scottish law firms overseas under the banner Scottish Legal International but this is still in the very early stages of development. The Law Society is also planning to launch a new venture for legaltech incubators. These in themselves are worthy ventures but I believe that to secure and grow the market for legal services we need to be much more strategic and ambitious.

I believe that Scottish Government should commission or facilitate a baseline study to identify the current quantum of the sector's contribution to the economy and to identify those niches in the global market where we might target our efforts.

Government should then work with the sector to bring all the key players together to develop and implement a strategy to maximise the potential for growth and the contribution that would make to our economy.

Chapter 11

OVERVIEW OF RECOMMENDATIONS

1. There should be a single independent regulator for all providers of legal services in Scotland, independent of those whom it regulates and of Government, responsible for the whole system of regulation including entry, standards, monitoring, complaints and redress, which covers individuals, entities and activities. That independent regulator should be a body accountable to the Scottish Parliament and subject to scrutiny by Audit Scotland.

Establishment and accountability

2. The legal character of and governance arrangements for the new body should be set out in primary legislation.
3. The definition of legal services, the regulatory objectives and the professional principles should be set out in primary legislation.
4. There should be a new regulatory framework that is principles-based, sustainable and flexible. It should embed the Better Regulation Principles, with the public and consumer interest at its heart.
5. The Board of the regulator should have a non-legal Chair and a non-legal majority to provide consumer and public confidence.
6. The Scottish Parliamentary Corporate Body should appoint the non-legal Chair through a public appointments process. As is standard practice, having been appointed the Chair may only be removed by a two thirds majority of Parliament therefore preventing any undue influence from Government.

7. The Chair should appoint an equal number of both professional and non-legal members of the Board by an independent public appointments process with an independent assessor external to the regulator.
8. The Chair and Board members should be non-executives with experience of corporate governance who are appointed under public appointment best practice principles, with a maximum time on the board of 8 years.
9. The Chief Executive of the regulator should be appointed by and accountable to the Board

Role and functions of the Independent Regulator

10. The new regulator and the system should be financed by a levy on practitioners and entities. The cost of the new regulatory arrangements should be no greater than the current model and should ensure proportionality.
11. The regulator should be required work in partnership with the legal profession, to ensure a sustainable and vibrant legal profession.
12. The regulator should be required to ensure it embeds a consumer voice in the organisation.
13. The regulator should be required to develop new systems, rules and processes in partnership with consumer bodies and those it regulates.
14. The regulator should be required to lay an annual report before the Scottish Parliament including details on progress, performance and budgets and should be able to be called to account to answer questions in Parliament.

15. The regulator should be empowered to seek approval as regulator in other jurisdictions.

Entry, Standards and Monitoring

16. The regulator will hold a register of those it regulates, any lawyer, solicitor, solicitor advocate, advocate, or commercial attorney who wishes to provide legal services must be admitted to the register.

17. The regulator should have oversight of education and training and work in partnership with all of the legal professional bodies to keep these areas under review.

18. The regulator should quality assure the membership bodies in accrediting Continuous Professional Development schemes.

19. The regulator should work with the professional bodies (The Faculty of Advocates, The Law Society of Scotland and The Association of Commercial Attorneys) to simplify existing codes of conduct and service standards including making them more consumer friendly, comparable and proportionate.

20. The title “lawyer” should be a protected term, in the same way as “solicitor”, where only those able to demonstrate recognised legal qualifications, and who are regulated, are permitted to provide legal services.

Entity regulation

21. The regulator should license all entities providing legal services *to the public and corporate entities*, subject to a “fitness to be an entity” test that the regulator should determine including protections such as professional indemnity insurance. All legal professionals licensed through the regulator would also have to be licensed through an entity. This would not include Advocates and in house professionals.

22. The model for entity regulation should be enabling, flexible and should apply to any organisation which employs at least one legal professional

23. The regulator should introduce proportionate arrangements including fees for licensing different types of entities and including not for profit organisations.

24. The Scottish Government and the regulator should review the standards and accreditation process for Scottish National Standards for Information and Advice Providers in order to establish if those providers covered by these standards should be regulated and ensure that regulation is proportionate.

25. The regulator should require to ensure that all licensed entities have a legal compliance director who is a regulated legal professional and a director of finance and compliance. They may have to be the same person where it is unavoidable e.g. sole traders. Those responsible for financial compliance need not be legal professionals.

26. The regulator should take on the role of Anti-Money Laundering regulator in Scotland *as well as the role of incidental financial business regime under financial services legislation*.

27. The new regulator of legal services should review whether the Financial Conduct Authority regulation of Claims Management Companies in Scotland is working or whether there are gaps or discrepancies around Scottish circumstances that need to be more carefully considered.

Regulation of Activities

28. There should be no substantial change at this stage to bring more activities within the scope of those activities “reserved” to solicitors or to remove activities i.e. will writing should not be reserved. *Entities licensed by the regulator should be able to undertake confirmation as an activity.*
29. It should be for the regulator to propose to the Scottish Government which activities to reserve to legal professionals in the future and which should be regulated.
30. The new regulator should work with Office of the Immigration Services Commissioner to ensure that individual legal professional immigration practitioners i.e. solicitors and non-legal professional immigration practitioners codes of conduct align. Complaints on legal professionals and non-legal professionals would sit with the appropriate regulator. Best practice sharing between the bodies should take place.

Quality improvement

31. The regulator should work with the Scottish Government to consider how data should best be shared to ensure consumers are protected from harm and enable the regulator to adopt a risk based approach to intervene where systemic issues are identified. The regulator should work with the professional bodies to establish a process to assist those professionals identified by this process to improve their standards.

Complaints

32. The legislation should require the regulator to develop a complaints handling process for those it regulates. This process should be based on well-established consumer principles and provide appropriate and speedy resolution for all parties. This should include the option of early dispute resolution learning from the Scottish Legal Complaints Commission’s positive experience of mediation services.

33. There should be a single gateway for complaints and a single investigation, where conduct concerns can be directed at any stage through a separate process and on to a single disciplinary tribunal where appropriate.
34. The regulator should be required to develop appropriate sanctions and establish rules for proportionate compensation.
35. The regulator should be required to develop a simple process of appeals which are only available at the end of the complaints process

Tribunal

36. The regulator should establish an independent arm’s length tribunal dealing with conduct cases referred by the regulator. This should cover all legal professional individuals and entities providing legal services.

Whistleblowing

37. The regulator should be required to develop a formal whistleblowing procedure.

Economy

38. The Scottish Government should require the Competition and Markets Authority to revisit the report it undertook on the legal services sector in England and Wales in 2016 and test the relevance of its findings for the Scottish legal services sector.
39. The Scottish Government should commission or facilitate a baseline study to identify the current quantum of the sector’s contribution to the economy and to identify those niches in the global market where we might target our efforts.
40. The Scottish Government should work with the sector to bring all the key players together to develop and implement a strategy to maximise the potential for growth and the contribution that would make to our economy.

Annex 1

PANEL MEMBERS

Esther Roberton, Chair

Since 2015, Esther has been Chair of NHS 24. She served as a non-executive director of the Scottish Ambulance Service from 2014 to 2018 and with Scottish Government from 2014 till 2017. She was previously Chair of NHS Fife and the Scottish Further Education Funding Council.

She served as an independent member of the Press Complaints Commission for seven years and was Chair of SACRO, the community justice charity. She held several roles with the Scottish Council for Development and Industry and was appointed Fellow for outstanding service.

Esther was actively involved in the campaign to secure Scotland's Parliament as Coordinator of the Scottish Constitutional Convention, and as a member of the Consultative Steering Group that developed the standing orders for the Parliament.

She has a strong track record in service user and stakeholder involvement and a commitment to the economic and social development of Scotland.

The Review Panel supporting the Chair included:

Dr Dame Denise Coia, Chair, Healthcare Improvement Scotland

Dame Denise Coia is Chair of Healthcare Improvement Scotland and a Board Member of the Care Inspectorate in Scotland. She is also Chair of General Medical Council Quality Scrutiny Group in London. A psychiatrist by background she was previously Senior Principal Medical Officer Mental Health (2006- 2011) to Scottish Government, Mental Health Advisor to Greater Glasgow Health Board (1998 – 2006). She has a long standing interest in professional and service regulation and was Vice President of the Royal College of Psychiatrists (UK), Chair of the Royal College of Psychiatrists Scotland, Secretary of the Academy of Royal Medical Colleges in Scotland and Board member of the Allied Health Professions Council UK.

Professor Lorne Crerar, Chairman, Harper Macleod LLP

Professor Lorne Crerar is a founding partner of the firm and is the firm's Chairman. Lorne

is the firm's Senior Partner in the Banking & Finance, Sports Sector Groups and Public Sector Group. Lorne has wide experience of the public sector and has been appointed by the Scottish Government to undertake a number of independent reviews. His report on Phase 2 of the Enterprise and Skills Review in 2017 led to the creation of a new Strategic

Board for Enterprise and Skills in Scotland, and saw him appointed as Chairman of the Implementation Board set up to deliver on its aims. His Independent Review of Regulation, Audit, Inspection and Complaints Handling of Public Services in

Scotland – "The Crerar Review" – saw most of his recommendations enshrined in statute – The Public Sector Reform (Scotland) Act 2010. Lorne has been Chairman of Highlands and Islands Enterprise (HIE) since 2012.

Laura Dunlop QC, Faculty of Advocates

Laura was admitted to the Faculty of Advocates in 1989, and appointed a Standing Junior to the Government in 1993. She was a co-editor of three editions of Gloag and Henderson: the Law of Scotland and became a QC in 2002. Since 2005, she has held office as Procurator to the General Assembly of the Church of Scotland. Between 2009 and 2014, she served part-time on the Scottish Law Commission, the first female commissioner in Scotland. Between 2009 and 2015, she was Senior Counsel to the Penrose Inquiry into transmission of viral infection by blood and blood products. She is a convener of the Mental Health Tribunal for Scotland and of the Pensions Appeal Tribunal, and serves as a deputy judge of the UK Upper Tribunal (Administrative Appeals Chamber).

Ray Macfarlane, Chair, Scottish Legal Aid Board

Ray practised as a solicitor in Glasgow before moving into senior management roles with Scottish Enterprise, where she was the Director of Legal Services and Company Secretary before being appointed the Managing Director and with HBOS plc. where she was Group Head of Community Investment and a Senior Director of Corporate Banking. She has held several non-executive appointments in the public and private sectors and is now the Chairman of Museums Galleries Scotland and a Trustee of the National Galleries of Scotland Foundation and of the Hopetoun House Foundation. She has been a member of the Scottish Legal Aid Board since 2010 and was appointed Chair in April 2016.

Jim Martin

Jim was Police Complaints Commissioner for Scotland from that office's inception in 2007 until he became Ombudsman on 1 May 2009. He was also the Scottish non-executive chairman of Logica and ran a management consultancy. Jim was General Secretary for the Educational Institute of Scotland from 1987 until 1995 and served as a member of the Scottish Funding Council. Jim stood down from his post as the Scottish Public Services Ombudsman on 30 April 2017. He became Chair of the SLCC in January 2018.

Trisha McAuley OBE, independent consumer expert

Trisha is an independent consumer expert and experienced Non-Executive Director. For over twenty years, she was a senior executive in UK and Scottish consumer organisations and is the former Scottish Director of Consumer Futures. She was awarded an OBE for services to consumer affairs in 2015. Trisha is a Board Director of Northern Ireland Water and of Energy Action Scotland. She is the Independent Chair of National Grid's Gas and Electricity Transmission Stakeholder Challenge Groups and Independent Chair of two statutory energy industry governance panels. She is a Member of: the ICAS Discipline Board, two Ofgem expert advisory panels, the ORR Consumer Expert Panel, the Civil Aviation Authority Consumer Panel and the Heathrow Consumer Challenge Board. She is a former Board Member of NHS Greater Glasgow and Clyde and of the Scottish Environment Protection Agency and former Chair of Glasgow City Integrated Joint Board.

Christine McLintock, Former President Law Society of Scotland

Christine was the immediate past president of the Law Society of Scotland (until the end of May 2017) and is a former partner and General Counsel of international law firm Pinsent Masons LLP. Christine is also currently the Chair of Cruse Bereavement Care Scotland and incoming Chair of the Lawscot Foundation, a charity supporting students from less advantaged backgrounds through their legal education journey. In June 2017 Christine also became a trustee of the Scottish Council of Law Reporting.

Nicholas Whyte, Chair, Scottish Solicitors' Discipline Tribunal

Nicholas Whyte is a solicitor and has been in private practice since 1976. He was appointed as a member of Scottish Solicitors Discipline Tribunal in September 2006 and has been Chair of the Tribunal since June 2016. He is a partner in MacHardy Alexander & Whyte and deals mainly with residential and commercial conveyancing and private client work. He previously held a part time appointment with the Appeals Service.

Due to a variety of reasons three panel members resigned at various stages during the Review. They are:

Alistair Morris, Former President of the Law Society of Scotland

Resigned January 2018

Derek Ogg QC

Resigned March 2018

Neil Stevenson, Chief Executive of the Scottish Legal Complaints Commission

Resigned January 2018

Annex 2

ENGAGEMENT DURING THE REVIEW

- Anderson Strathern Solicitors
- Association of Commercial Attorneys
- Audit Scotland
- Bar Standards Board, England & Wales
- Brodies LLP
- Castlemilk Law & Money Advice Centre
- Chair of the Clementi Review of Legal Services in England and Wales
- Chair of the Thomson Review on the rights of audience in the supreme courts in Scotland
- Citizens Advice Scotland
- Citizens Advice Scotland – Access to Justice sub group
- Competition and Markets Authority
- Council for Licensed Conveyancers
- President of Council of Bars and Law Societies of Europe (Partner, Murray Beith Murray solicitors)
- Creative Consequences, Australia
- Crown Office and Procurator Fiscal
- Digby Brown Solicitors
- Faculty of Advocates
- Federation of Small Business
- Chair of Fife Law Centre
- General Medical Council
- General Teaching Council for Scotland
- Govan Law Centre
- Harper Macleod LLP
- Institute of Chartered Accountants Scotland
- Law Society of England and Wales
- Legal Ombudsman
- Legal Service Regulatory Authority, Ireland
- Legal Services Board and Legal Services Consumer Panel, England & Wales
- Legal Spark
- Lindsays Solicitors
- Ministry of Justice, Ireland
- Monash University, Australia
- Office of the Immigration Services Commissioner
- Pinsent Masons
- Professional Standards Authority
- Chair of Regulatory Review Group
- Scotland IS
- Scottish Association of Law Centres
- Scottish Civil Justice Council: Access to Justice Committee
- Scottish Courts and Tribunal Service
- Scottish Enterprise
- Scottish Law Agents Society
- Scottish Legal Complaints Commission Board
- Scottish Legal Complaints Commission, Consumer Panel
- Chair of Scottish International (Partner Shepherd and Wedderburn)
- Scottish Women's Aid
- Society of Will Writers
- Solicitors Regulatory Authority
- The Bar Council, England & Wales
- The Law Society of Scotland
- The Law Society of Scotland Regulatory Committee
- The Law Society of Scotland Lay Members
- Thorntons Law LLP
- UK Parliamentary Commissioner for Standards
- Representative of University College London, Faculty of Laws
- Representative of University of Strathclyde – Centre for Professional Legal Studies
- Which?
- Event to hear views on how Claims Management Companies operate in Scotland
- Events to hear from members of Bar Associations
- Event to hear from members of the Society of Solicitor Advocates
- Event to hear views from members of the large firms providing legal services

Bibliography

Admission as Solicitor (Scotland) Regulations 2011 available at: <https://www.lawscot.org.uk/media/9330/admission-regulations-2011.pdf>

Architects Registration Board, facts & figures: finance, 2017 available at: <http://2017.arb.org.uk/facts-figures/finance/>

Baldwin, R, Cave M & Lodge M, Oxford, 2012. Understanding Regulation: Theory, Strategy and Practice available at: [https://books.google.co.uk/books?id=x_lcrqoqb9oC&printsec=frontcover&dq=Baldwin,+R,+Cave+M+%26+Lodge+M+%E2%80%9CUnderstanding+Regulation:+Theory,+Strategy+and+Practice%E2%80%9D+\(Oxford,+2012\)&hl=en&sa=X&ved=0ahUKEwjfPM_JpfHcAhUJbVAKHdxDeMQ6AEIJzAA#v=onepage&q&f=false](https://books.google.co.uk/books?id=x_lcrqoqb9oC&printsec=frontcover&dq=Baldwin,+R,+Cave+M+%26+Lodge+M+%E2%80%9CUnderstanding+Regulation:+Theory,+Strategy+and+Practice%E2%80%9D+(Oxford,+2012)&hl=en&sa=X&ved=0ahUKEwjfPM_JpfHcAhUJbVAKHdxDeMQ6AEIJzAA#v=onepage&q&f=false)

Boon, A, 2017. International Perspectives on the Regulation of Lawyer and Legal Services available at: [https://books.google.co.uk/books?id=Li48DwAAQBAJ&pg=PR4&lpg=PR4&dq=Boon,+A-+International+Perspectives+on+the+Regulation+of+Lawyer+and+Legal+Services+\(Bloomsbury,+Hart+Publishing+2017\)&source=bl&ots=5837sveET4&sig=NHTwVbs8LupevalV6I_9lvMM5z4&hl=en&sa=X&ved=2ahUKEwiK8dKuovHcAhXKKVAKHeUNDdcQ6AEwAnoECAgQAQ#v=onepage&q&f=false](https://books.google.co.uk/books?id=Li48DwAAQBAJ&pg=PR4&lpg=PR4&dq=Boon,+A-+International+Perspectives+on+the+Regulation+of+Lawyer+and+Legal+Services+(Bloomsbury,+Hart+Publishing+2017)&source=bl&ots=5837sveET4&sig=NHTwVbs8LupevalV6I_9lvMM5z4&hl=en&sa=X&ved=2ahUKEwiK8dKuovHcAhXKKVAKHeUNDdcQ6AEwAnoECAgQAQ#v=onepage&q&f=false)

Business Experts and Law Forum, 2008. Report available at: <https://www.gov.scot/Resource/Doc/243135/0067662.pdf>

Call for Evidence, 2018. *Responses* available at: <https://www.gov.scot/About/Review/Regulation-Legal-Services/RegulationLegalServices/Responses-to-Call-for-Evidence>

Clementi D, 2004. Review of the Regulatory Framework for Legal Services in England and Wales: A Consultation Paper. Available at: <http://webarchive.nationalarchives.gov.uk/20090607170356/http://www.legal-services-review.org.uk/content/report/index.htm>

Competition and Markets Authority, 2016. Legal services market study: Final report. Available at: <https://www.gov.uk/cma-cases/legal-services-market-study>

<https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>

Consumer Focus (2011), Law Society consumer event: Bridging the gap available at: <https://research.legalservicesboard.org.uk/analysis/demand/service-preferences/>

Consumer Rights Act 2015 available at: <http://www.legislation.gov.uk/ukpga/2015/15/contents/enacted>

Enterprise Research Centre, 2015. Innovation in Legal Services: A report for the Solicitors Regulation Authority and Legal Services Board available at: <https://www.sra.org.uk/sra/how-we-work/reports/innovation-report.page>

Europe Economics, 2013. Economic research into Regulatory Restrictions in the Legal Profession: A Report for the Office of Fair Trading available at: http://webarchive.nationalarchives.gov.uk/20140402182937/http://www.oft.gov.uk/shared_oftr/reports/professional_bodies/OFT1460.pdf

Europe Economics, March 2018. The Regulated and Unregulated Legal Services Market in Scotland: A Review of the Evidence – the final report.

Financial Guidance and Claims Act 2018 available at: http://www.legislation.gov.uk/ukpga/2018/10/pdfs/ukpga_20180010_en.pdf

Hosier, M, 2017. *Eire: The lawyers of the Celtic Phoenix* (section 4, Boon A, 2017) available at: [https://books.google.co.uk/books?id=Li48DwAAQBAJ&pg=PR4&lpg=PR4&dq=Boon,+A-+International+Perspectives+on+the+Regulation+of+Lawyer+and+Legal+Services+\(Bloomsbury,+Hart+Publishing+2017\)&source=bl&ots=5837sveET4&sig=NHTwVbs8LupevalV6I_9lvMM5z4&hl=en&sa=X&ved=2ahUKEwiK8dKuovHcAhXKKVAKHeUNDdcQ6AEwAnoECAgQAQ#v=onepage&q&f=false](https://books.google.co.uk/books?id=Li48DwAAQBAJ&pg=PR4&lpg=PR4&dq=Boon,+A-+International+Perspectives+on+the+Regulation+of+Lawyer+and+Legal+Services+(Bloomsbury,+Hart+Publishing+2017)&source=bl&ots=5837sveET4&sig=NHTwVbs8LupevalV6I_9lvMM5z4&hl=en&sa=X&ved=2ahUKEwiK8dKuovHcAhXKKVAKHeUNDdcQ6AEwAnoECAgQAQ#v=onepage&q&f=false)

Law Society of Scotland, 2015. The Solicitors (Scotland) Act 1980 – The Case for Change, available at: <https://www.lawscot.org.uk/media/10152/the-solicitors-scotland-act-1980-the-case-for-change-regulation-pa.pdf>

Law Society of Scotland, 2017. Financial Statements for the year ended 31 October 2017 available at: <https://www.lawscot.org.uk/media/359848/financial-report-2017.pdf>

Law Society of Scotland, 2018. Case for Change: Revisited available at: <https://www.gov.scot/Resource/0053/00535856.pdf>

Legal Profession and Legal Aid (Scotland) Act 2007 available at <https://www.legislation.gov.uk/asp/2007/5/contents>

Legal Services Act 2007 available at: <https://www.legislation.gov.uk/ukpga/2007/29/contents>

Legal Services (Scotland) Act 2010 available at: https://www.legislation.gov.uk/asp/2010/16/pdfs/asp_20100016_en.pdf

Mayson, S, 19 December 2014. Clementi 10 years on (and now for the next 10) available at: <https://stephenmayson.com/2014/12/19/clementi-10-years-on-and-now-for-the-next-10/>

Mize, SE, 2017. New Zealand: Finding the Balance between Self-Regulation and Government Oversight (section 6, Boon A, 2017) available at: [https://books.google.co.uk/books?id=Li48DwAAQBAJ&pg=PR4&lpg=PR4&dq=Boon,+A+-+International+Perspectives+on+the+Regulation+of+Lawyer+and+Legal+Services+\(Bloomsbury,+Hart+Publishing+2017\)&source=bl&ots=5837sveET4&sig=NHTwVbs8LupevalV6I_9lvMM5z4&hl=en&sa=X&ved=2ahUKEwiK8dKuovHcAhXKKVAKHeUNDdcQ6AEwAnoECAgQAQ#v=onepage&q&f=false](https://books.google.co.uk/books?id=Li48DwAAQBAJ&pg=PR4&lpg=PR4&dq=Boon,+A+-+International+Perspectives+on+the+Regulation+of+Lawyer+and+Legal+Services+(Bloomsbury,+Hart+Publishing+2017)&source=bl&ots=5837sveET4&sig=NHTwVbs8LupevalV6I_9lvMM5z4&hl=en&sa=X&ved=2ahUKEwiK8dKuovHcAhXKKVAKHeUNDdcQ6AEwAnoECAgQAQ#v=onepage&q&f=false)

Office of Fair Trading, 2007. Response to Which? super complaint available at: http://webarchive.nationalarchives.gov.uk/20140402182600/http://oft.gov.uk/shared_oft/super-complaints/oft946.pdf

Regulatory Reform (Scotland) Act 2014 available at: http://www.legislation.gov.uk/asp/2014/3/pdfs/asp_20140003_en.pdf

Research Working Group on the Legal Services Market in Scotland, May 2006, available at: <https://www.gov.scot/Resource/Doc/111789/0027239.pdf>

Scottish Annual Business Statistics, 2013 available at: <https://www.gov.scot/Resource/0048/00484162.pdf>

Scottish Consumer Council, 2007. Response to the Office of Fair Trading relating to the Which? super-complaint available at: <http://webarchive.nationalarchives.gov.uk/20090908164026/http://scotcons.demonweb.co.uk/legal/documents/response-to-the-office-of-fair-trading-relating-to-the-which-super-complaint-about-restrictions-on-business.pdf>

Scottish Government, March 2015. Economic Strategy available at: <https://beta.gov.scot/publications/scotlands-economic-strategy/>

Scottish Government 2018. Civil Justice Statistics in Scotland 2016-17 available at: <https://www.gov.scot/Publications/2018/08/9569/0>

Scottish Government, 2018. Consumer study on Scottish users of legal services

Scottish Government 2018. Recorded crime in Scotland, 2017-18 available at: <https://www.gov.scot/Resource/0054/00540695.pdf>

Scottish Legal Complaints Commission, 2016. #ReimagineRegulation: Priorities for a consultation on legal services regulation available at: <https://www.scottishlegalcomplaints.org.uk/reimagine-regulation>

Scottish Legal Complaints Commission, 2017. Consumer Panel Leaflet, Consumer principles: What do they mean for Scottish legal consumers. Available at: https://www.scottishlegalcomplaints.org.uk/media/69926/consumer_principles_leaflet.pdf

Scottish Legal Complaints Commission, Budget Reports available at: <https://www.scottishlegalcomplaints.org.uk/for-practitioners/budget-levy.aspx>

Scottish Parliament, 2002. Justice 1 committee report on Regulation of the Legal Profession Inquiry available at: <http://archive.scottish.parliament.uk/business/committees/historic/justice1/inquiries-02/j1-lps-pdfs/lps-059.pdf>

Scottish Parliament, 2018. Training the next generation of lawyers: professional legal education in Scotland 2018, available at: <https://sp-bpr-en-prod-cdn.azureedge.net/published/J/2018/9/23/Training-the-next-generation-of-lawyers--professional-legal-education-in-Scotland/JS052018R8.pdf>

Solicitors Regulation Authority, November 2015. Looking to the Future: Flexibility and public protection – a phased review of our regulatory approach available at: <https://www.sra.org.uk/sra/policy/future/position-paper.page>

Solicitors (Scotland) Act 1980 available at: https://www.legislation.gov.uk/ukpga/1980/46/pdfs/ukpga_19800046_en.pdf

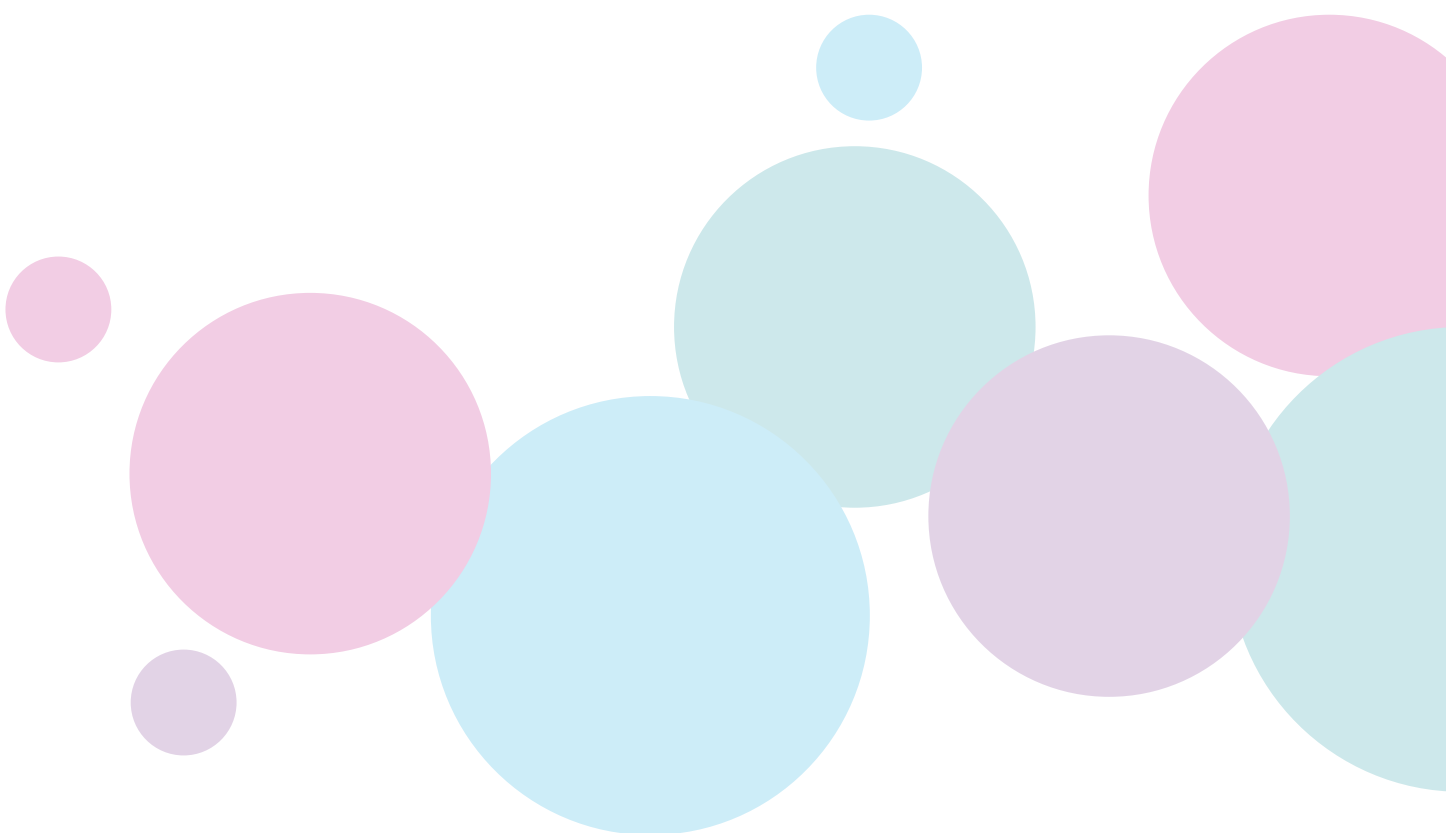
TheCityUK Report, July 2016. UK Legal Services 2016 available at: <https://www.thecityuk.com/assets/2016/Reports-PDF/618d27dbbd/UK-Legal-services-2016.pdf>

Thomson Review, March 2010: Rights of Audience in the Supreme Courts in Scotland, available at: <https://www.gov.scot/Resource/Doc/305606/0095847.pdf>

UK Government, November 2015. A Better Deal: boosting competition to bring down bills for families and firms available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/480797/a_better_deal_for_families_and_firms_print.pdf

UK Government, 2016. Consultation, Legal services: removing barriers to competition available at: <https://consult.justice.gov.uk/digital-communications/legal-services-removing-barriers-to-competition/>

Which? 2007. Super complaint to the Office of Fair trading, available at: <https://about-which.s3.amazonaws.com/policy/media/documents/59b004d5a9362-legal-services-in-scotland-which-supercomplaint-445253.pdf>



Hard copy versions of the report can be obtained from:
Access to Justice Team
Civil Law and Legal System Division
St Andrews House
Edinburgh